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ABSTRACT

Contents of these hearings include: (1) U.S. Supreme Court School Desegregation Cases; (2) School Desegregation Cases with Metropolitan Implications; (3) Other School Desegregation Cases; (4) State Desegregation Law Cases; (5) School Finance Cases; and, (6) Equal Opportunity in Housing Cases. (SB)

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SELECTED COURT DECISIONS
RELATING TO
EQUAL EDUCATIONAL OPPORTUNITY

SELECT COMMITTEE ON
EQUAL EDUCATIONAL OPPORTUNITY
UNITED STATES SENATE

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EDUCATION & WELFARE
OFFICE OF EDUCATION
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Relating To
Equal Educational Opportunity

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SELECTED COURT DECISIONS
Relating To
Equal Educational Opportunity

Part I
U.S. SUPREME COURT
SCHOOL DESEGREGATION CASES

BROWN *v.* BOARD OF EDUCATION
347 U.S. 483 (1954)

APPEAL No. 1

FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF KANSAS*

ARGUED DECEMBER 9, 1952—REARGUED DECEMBER 8, 1953

DECIDED MAY 17, 1954

Robert L. Carter argued the cause for appellants in No. 1 on the original argument and on the reargument. *Thurgood Marshall* argued the cause for appellants in No. 2 on the original argument and *Spottswood W. Robinson III*, for appellants in No. 4 on the original argument, and both argued the causes for appellants in Nos. 2 and 4 on the reargument. *Louis L. Redding* and *Jack Greenberg* argued the cause for respondents in No. 10 on the original argument and *Jack Greenberg* and *Thurgood Marshall* on the reargument.

On the briefs were *Robert L. Carter*, *Thurgood Marshall*, *Spottswood W. Robinson III*, *Louis L. Redding*, *Jack Greenberg*, *George E. C. Hayes*, *William R. Ming, Jr.*, *Constance Baker Motley*, *James M. Nabrit, Jr.*, *Charles S. Scott*, *Frank D. Reeves*, *Harold R. Boulware* and *Oliver W. Hill* for appellants in Nos. 1, 2, and 4 and respondents in No. 10; *George M. Johnson* for appellants in Nos. 1, 2, and 4;

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*Together with No. 2, *Briggs et al.* v. *Elliott et al.*, on appeal from the United States District Court for the Eastern District of South Carolina, argued December 9–10, 1952, reargued December 7–8, 1953; No. 4, *Davis et al.* v. *County School Board of Prince Edward County, Virginia, et al.*, on appeal from the United States District Court for the Eastern District of Virginia, argued December 10, 1952, reargued December 7–8, 1953; and No. 10, *Gebhart et al.* v. *Belton et al.*, on certiorari to the Supreme Court of Delaware, argued December 11, 1952, reargued December 9, 1953.

and *Loren Miller* for appellants in Nos. 2 and 4. *Arthur D. Shores* and *A. T. Walden* were on the statement as to jurisdiction and a brief opposing a motion to dismiss or affirm in No. 2.

Paul E. Wilson, assistant attorney general of Kansas, argued the cause for appellees in No. 1 on the original argument and on the reargument. With him on the briefs was *Harold R. Fatzer*, attorney general.

John W. Davis argued the cause for appellees in No. 2 on the original argument and for appellees in Nos. 2 and 4 on the reargument. With him on the briefs in No. 2 were *T. C. Callison*, attorney general of South Carolina, *Robert McC. Figg, Jr.*, *S. E. Rogers*, *William R. Meagher*, and *Taggart Whipple*.

J. Lindsay Almond, Jr., attorney general of Virginia, and *T. Justin Moore* argued the cause for appellees in No. 4 on the original argument and for appellees in Nos. 2 and 4 on the reargument. On the briefs in No. 4 were *J. Lindsay Almond, Jr.*, attorney general, and *Henry T. Wickham*, special assistant attorney general, for the State of Virginia, and *T. Justin Moore*, *Archibald G. Robertson*, *John W. Riely* and *T. Justin Moore, Jr.*, for the Prince Edward County school authorities, appellees.

H. Albert Young, attorney general of Delaware, argued the cause for petitioners in No. 10 on the original argument and on the reargument. With him on the briefs was *Louis J. Finger*, special deputy attorney general.

By special leave of Court, *Assistant Attorney General Rankin* argued the cause for the United States on the reargument, as *amicus curiae*, urging reversal in Nos. 1, 2, and 4 and affirmance in No. 10. With him on the brief were *Attorney General Brownell*, *Philip Elman*, *Leon Ulman*, *William J. Lamont* and *M. Magdelena Schoch*. *James P. McGranery*, then attorney general, and *Philip Elman* filed a brief for the United States on the original argument, as *amicus curiae*, urging reversal in Nos. 1, 2, and 4 and affirmance in No. 10.

Briefs of *amici curiae* supporting appellants in No. 1 were filed by *Shad Polier*, *Will Maslow* and *Joseph B. Robison* for the American Jewish Congress; by *Edwin J. Lukas*, *Arnold Forster*, *Arthur Garfield Hays*, *Frank E. Karelsen*, *Leonard Haas*, *Saburo Kido* and *Theodore Leskes* for the American Civil Liberties Union et al.; and by *John Ligtenberg* and *Selma M. Borchardt* for the American Federation of Teachers. Briefs of *amici curiae* supporting appellants in No. 1 and respondents in No. 10 were filed by *Arthur J. Goldberg* and *Thomas E. Harris* for the Congress of Industrial Organizations and by *Phineas Indritz* for the American Veterans Committee, Inc.

Mr. Chief Justice WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.[1]

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[1] In the Kansas case, *Brown* v. *Board of Education*, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan. Gen. Stat. § 72-1724 (1949). Pursuant to that authority,

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to

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the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F. Supp. 797. The case is here on direct appeal under 28 U.S.C. § 1253.

In the South Carolina case, *Briggs* v. *Elliott*, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S.C. Const., Art. XI, § 7; S.C. Code § 5377 (1942). The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 98 F. Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U.S. 350. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F. Supp. 920. The case is again here on direct appeal under 28 U.S.C. § 1253.

In the Virginia case, *Davis* v. *County School Board*, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va. Const., § 140; Va. Code § 22-221 (1950). The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to "proceed with all reasonable diligence and dispatch to remove" the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F. Supp. 337. The case is here on direct appeal under 28 U.S.C. § 1253.

In the Delaware case *Gebhart* v. *Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del. Const., Art. X, § 2; Del. Rev. Code § 2631 (1935). The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. 87 A. 2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, *infra*), but did not rest his decision on that ground. *Id.*, at 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A. 2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U.S. 891. The plaintiffs, who were successful below, did not submit a cross-petition.

race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the 14th amendment. In each of the cases other than the Delaware case, a three-judge Federal district court denied relief to the plaintiffs on the so-called separate but equal doctrine announced by this Court in *Plessy* v. *Ferguson*, 163 U.S. 537. Under that doctrine equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.[2] Argument was heard in the 1952 term, and reargument was heard this term on certain questions propounded by the Court.[3]

Reargument was largely devoted to the circumstances surrounding the adoption of the 14th amendment in 1868. It covered exhaustively consideration of the amendment in Congress, ratification by the States, then existing practices in racial segregation, and the views of proponents and opponents of the amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-war amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the amendments and wished them to have the most limited effect. What others in Congress and the State legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the amendment's history, with respect to segregated schools, is the status of public education at that time.[4] In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some States. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the amendment had advanced further in the North, but the effect of the amendment on northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but 3 months a year in many States; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the 14th amendment relating to its intended effect on public education.

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[2] 344 U.S. 1, 141, 891.

[3] 345 U.S. 972. The Attorney General of the United States participated both Terms as *amicus curiae*.

[4] For a general study of the development of public education prior to the Amendment, see Butts and Cremin, A History of Education in American Culture (1953). Pts. I, II; Cubberley, Public Education in the United States (1934 ed.), cc. II–XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, *supra*, at 269–275; Cubberley, *supra*, at 288–339, 408–431; Knight, Public Education in the South (1922) cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (*e.g.*, the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408–423. In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. *Id.*, at 427–428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112–132, 175–195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra*, at 563–565.

In the first case in this Court construing the 14th amendment, decided shortly after its adoption, the Court interpreted it as proscribing all State-imposed discriminations against the Negro race.[5]

The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy* v. *Ferguson*, *supra*, involving not education but transportation.[6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education.[7] In *Cumming* v. *County Board of Education*, 175 U.S. 528, and *Gong Lum* v. *Rice*, 275 U.S. 78, the validity of the doctrine itself was not challenged.[8] In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337; *Sipuel* v. *Oklahoma*, 332 U.S. 631; *Sweatt* v. *Painter*, 339 U.S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637. In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt* v. *Painter*, *supra*, the Court expressly reserved decision on the question whether *Plessy* v. *Ferguson* should be held inapplicable to public education.

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[5] *Slaughter-House Cases*, 16 Wall. 36, 67–72 (1873); *Strauder* v. *West Virginia*, 100 U.S. 303, 307–308 (1880):

"It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

See also *Virginia* v. *Rives*, 100 U.S. 313, 318 (1880); *Ex parte Virginia*, 100 U.S. 339, 344–345 (1880).

[6] The doctrine apparently originated in *Roberts* v. *City of Boston*, 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

[7] See also *Berea College* v. *Kentucky*, 211 U.S. 45 (1908).

In the instant cases, that question is directly presented. Here, unlike *Sweatt* v. *Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors.[9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of State and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

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[8] In the *Cumming* case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the *Gong Lum* case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

[9] In the Kansas case, the court below found substantial equality as to all such factors. 98 F. Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding "promptly and in good faith to comply with the court's decree." 103 F. Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already "afoot and progressing" (103 F. Supp. 337, 341); since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A. 2d 137, 149.

In *Sweatt* v. *Painter*, *supra*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin* v. *Oklahoma State Regents*, *supra*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivaton of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[10]

Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson*, this finding is amply supported by modern authority.[11] Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the 14th amendment. This disposition makes unnecessary any discussion whether such segregation also violates the due process clause of the 14th amendment.[12]

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[10] A similar finding was made in the Delaware case: "I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated." 87 A. 2d 862, 865.

[11] K. B. Clark, Effect of Prejudice and Discrimination on Personalty Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregaton Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44–48; Frazier, The Negro in the United States (1949), 674–681. And see generally Myrdal, An American Dilemma (1944).

Because these are class actions, because of the wide applicability of this decison, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on questions 4 and 5 previously propounded by the Court for the reargument this term.[13] The Attorney General of the United States is again invited to participate. The attorneys general of the States requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.[14]

It is so ordered.

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[12] See *Bolling* v. *Sharpe*, *post*, p. 497, concerning the Due Process Clause of the Fifth Amendment.

[13] "4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(*a*) would decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice,or

"(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4(*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(*b*)

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issues should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(*d*) should this Court remand to the courts of the first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

[14] See Rule 42, Revised Rules of this Court (effective July 1, 1954).

BROWN *v.* BOARD OF EDUCATION

349 U.S. 294 (1955)

APPEAL No. 1

FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF KANSAS*

REARGUED ON THE QUESTION OF RELIEF APRIL 11–14, 1955

OPINIONS AND JUDGMENTS ANNOUNCED MAY 31, 1955

1. Racial discrimination in public education is unconstitutional, 347 U.S. 483, 497, and all provisions of Federal, State, or local law requiring or permitting such discrimination must yield to this principle.

2. The judgments below (except that in the *Delaware* case) are reversed and the cases are remanded to the district courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit the parties to these cases to public schools on a racially nondiscriminatory basis with all deliberate speed.

   a. School authorities have the primary responsibility for elucidating, assessing and solving the varied local school problems which may require solution in fully implementing the governing constitutional principles.

   b. Courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.

   c. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.

   d. In fashioning and effectuating the decrees, the court will be guided by equitable principles—characterized by a practical flexibility in shaping remedies and a facility for adjusting and reconciling public and private needs.

   e. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis.

   f. Courts of equity may properly take into account the public interest in the elimination in a systematic and effective manner of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles enunciated in 347 U.S. 483, 497; but the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

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* Together with No. 2, *Briggs et al.* v. *Elliott et al.*, on appeal from the United States District Court for the Eastern District of South Carolina; No. 3, *Davis et al.* v. *County School Board of Prince Edward County, Virginia, et al.*, on appeal from the United States District Court for the Eastern District of Virginia; No. 4, *Bolling et al.* v. *Sharpe et al.*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit; and No. 5, *Gebhart et al.* v. *Belton et al.*, on certiorari to the Supreme Court of Delaware.

g. While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with the ruling of this Court.

h. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner.

i. The burden rests on the defendants to establish that additional time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.

j. The courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.

k. The courts will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system.

l. During the period of transition, the courts will retain jurisdiction of these cases.

3. The judgment in the Delaware case, ordering the immediate admission of the plaintiffs to schools previously attended only by white children, is affirmed on the basis of the principles stated by this Court in its opinion, 347 U.S. 483; but the case is remanded to the Supreme Court of Delaware for such further proceedings as that court may deem necessary in the light of this opinion.

98 F. Supp. 797, 103 F. Supp. 920, 103 F. Supp. 337, and judgment in No. 4, reversed and remanded.

91 A. 2d 137, affirmed and remanded.

COUNSEL FOR PARTIES

Robert L. Carter argued the cause for *appellants in No. 1.* Spottswood W. Robinson III, argued the causes for *appellants in Nos. 2 and 3.* George E. C. Hayes and James M. Nabrit, Jr., argued the cause for *petitioners in No. 4.* Louis L. Redding argued the cause for *respondents in No. 5.* Thurgood Marshall argued the causes for *appellants in Nos. 1, 2, and 3, petitioners in No. 4* and *respondents in No. 5.*

On the briefs were Harold Boulware, Robert L. Carter, Jack Greenberg, Oliver W. Hill, Thurgood Marshall, Louis L. Redding, Spottswood W. Robinson, III, Charles S. Scott, William T. Coleman, Jr., Charles T. Duncan, George E. C. Hayes, Loren Miller, William R. Ming, Jr., Constance Baker Motley, James M. Nabrit, Jr., Louis H. Pollak, and Frank D. Reeves for *appellants in Nos. 1, 2, and 3,* and *respondents in No. 5;* and George E. C. Hayes, James M. Nabrit, Jr., George M. Johnson, Charles W. Quick, Herbert O. Reid, Thurgood Marshall, and Robert L. Carter for *petitioners in No. 4.*

Harold R. Fatzer, attorney general of Kansas, argued the cause for *appellees in No. 1.* With him on the brief was Paul E. Wilson, assistant attorney general. Peter F. Caldwell filed a brief for the Board of Education of Topeka, Kans., *appellee.*

S. E. Rogers and Robert McC. Figg, Jr., argued the cause and filed a brief for *appellees in No. 2.*

J. Lindsay Almond, Jr., attorney general of Virginia, and Archibald G. Robertson argued the cause for *appellees in No. 3.* With them on the brief were Henry T. Wickham, special assistant to the attorney general, T. Justin Moore, John W. Riely and T. Justin Moore, Jr.

Milton D. Korman argued the cause for *respondents in No. 4.* With him on the brief were Vernon E. West, Chester H. Gray, and Lyman J. Umstead.

Joseph Donald Craven, Attorney General of Delaware, argued the cause for *petitioners in No. 5.* On the brief were H. Albert Young, then attorney general, Clarence W. Taylor, deputy attorney general, and Andrew D. Christie, special deputy to the attorney general.

In response to the Court's invitation, 347 U.S. 483, 495–496, Solicitor General Sobeloff participated in the oral argument for the *United States.* With him on the brief were Attorney General Brownell, Assistant Attorney General Rankin, Philip Elman, Ralph S. Spritzer and Alan S. Rosenthal.

By invitation of the Court, 347 U.S. 483, 496, the following State officials presented their views orally as *amici curiae:* Thomas J. Gentry, attorney general of Arkansas, wtih whom on the brief were James L. Sloan, assistant attorney general, and Richard B. McCulloch, special assistant attorney general. Richard W. Ervin, attorney general of Florida, and Ralph E. Odum, assistant attorney general, both of whom were also on a brief. C. Ferdinand Sybert, attorney general of Maryland, with whom on the brief were Edward D. E. Rollins, then attorney general, W. Giles Parker, assistant attorney general, and James H. Norris, Jr., special assistant attorney general. I. Beverly Lake, assistant attorney general of North Carolina, with whom on the brief were Harry McMullan, attorney general, and T. Wade Bruton, Ralph Moody and Claude L. Love, assistant attorneys general. Mac Q. Williamson, attorney general of Oklahoma, who also filed a brief. John Ben Shapperd, attorney general of Texas, and Burnell Waldrep, assistant attorney general, with whom on the brief were Billy E. Lee, J. A. Amis, Jr., L. P. Lollar, J. Fred Jones, John Davenport, John Reeves and Will Davis.

Phineas Indritz filed a brief for the American Veterans Committee, Inc., as *amicus curiae.*

OPINION OF THE COURT

Mr. Chief Justice Warren delivered the opinion of the Court.

These cases were decided on May 17, 1954. The opinions of that date,[1] declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of Federal, State, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded.

Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief.[2] In view of the nationwide importance of the decision, we invited the Attorney General of the United States and the attorneys general of all States requiring or permitting racial discrimination in public education to present their views on that question. The parties, the United States, and the States of Florida, North Carolina, Arkansas, Oklahoma, Maryland, and Texas filed briefs and participated in the oral argument.

These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination. The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the States appearing as *amici curiae*, and in other States as well. Substantial progress has been made in the District of Columbia and in the communities in Kansas and Delaware involved in this litigation. The defendants in the cases coming to us from South Carolina and Virginia are awaiting the decision of this Court concerning relief.

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.

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[1] 347 U.S. 483; 347 U.S. 497.

[2] Further argument was requested on the following questions, 347 U.S. 483, 495–496, n. 13, previously propounded by the Court:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment.

"(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4 (*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (*b*),

"(*a*) should this Court formulate detailed decrees in these cases;

"(*b*) if so, what specific issue should the decrees reach;

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

Accordingly, we believe it appropriate to remand the cases to those courts.[3]

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies[4] and by a facility for adjusting and reconciling public and private needs.[5] These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below, except that in the *Delaware* case, are accordingly reversed and the cases are remanded to the district courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. The judgment in the *Delaware* case—ordering the immediate admission of the plaintiffs to schools previously attended only by white children—is affirmed on the basis of the principles stated in our May 17, 1954, opinion, but the case is remanded to the Supreme Court of Delaware for such further proceedings as that court may deem necessary in light of this opinion.

It is so ordered.

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[3] The cases coming to us from Kansas, South Carolina, and Virginia were originally heard by three-judge District Courts convened under 28 U.S.C. §§ 2281 and 2284. These cases will accordingly be remanded to those three-judge courts. See *Briggs* v. *Elliott*, 342 U.S. 350.

[4] See *Alexander* v. *Hillman*, 296 U.S. 222, 239.

[5] See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329–330.

COOPER *v.* AARON

358 U.S. 1 (1958)

CERTIORARI

TO THE U.S. COURT OF APPEALS FOR THE 8TH CIRCUIT *

No. 1. Argued September 11, 1958—Decided September 12, 1958

Opinion Announced September 29, 1958

Richard C. Butler argued the cause for *petitioners*. With him on the brief were A. F. House and, by special leave of Court, John H. Haley, *pro hac vice*.

Thurgood Marshall argued the cause for *respondents*. With him on the brief Wiley A. Branton, William Coleman, Jr., Jack Greenberg, and Louis H. Pollak.

Solicitor General Rankin, at the invitation of the Court, *post*, page 27, argued the cause for the United States, as *amicus curiae*, urging that the relief sought by respondents should be granted. With him on the brief were Oscar H. Davis, Philip Elman, and Ralph S. Spritzer.

OPINION OF THE COURT

Opinion of the Court by The Chief Justice, Mr. Justice Black, Mr. Justice Frankfurter, Mr. Justice Douglas, Mr. Justice Burton, Mr. Justice Clark, Mr. Justice Harlan, Mr. Justice Brennan, and Mr. Justice Whittaker.

As this case reaches us, it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and legislature of a State that there is no duty on State officials to obey Federal court orders resting on this Court's considered interpretation of the U.S. Constitution. Specifically, it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown* v. *Board of Education* (347 U.S. 483). That holding was that the 14th amendment forbids States to use their governmental powers to bar children on racial grounds from atending schools where there is State participation through any arrangement, management, funds, or property. We are urged to uphold a suspension of the Little Rock School

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*Note.—The *per curiam* opinion announced on September 12, 1958, and printed in a footnote, *post*, p. 5, applies not only to this case but also to No. 1 Miscellaneous, August Special Term, 1958, *Aaron et al.* v. *Cooper et al.*, on application for vacation of order of the United States Court of Appeals for the Eighth Circuit staying issuance of its mandate, for stay of order of the United States District Court for the Eastern District of Arkansas, and for such other orders as petitioners may be entitled to, argued August 28, 1958.

Board's plan to do away with segregated public schools in Little Rock until State laws and efforts to upset and nullify our holding in *Brown* v. *Board of Education* have been further challenged and tested in the courts. We reject these contentions.

The case was argued before us on September 11, 1958. On the following day we, unanimously affirmed the judgment of the Court of Appeals for the Eighth Circuit (257 F. 2d 33), which had reversed a judgment of the District Court for the Eastern District of Arkansas (163 F. Supp. 13). The district court had granted the application of the petitioners, the Little Rock School Board and school superintendent, to suspend for 2½ years the operation of the school board's court-approved desegregation program. In order that the school board might know, without doubt, its duty in this regard before the opening of school, which had been set for the following Monday, September 15, 1958, we immediately issued the judgment, reserving the expression of our supporting views to a later date.* This opinion of all of the members of the Court embodies those views.

The following are the facts and circumstances so far as necessary to show how the legal questions are presented.

On May 17, 1954, this court decided that enforced racial segregation in the public schools of a State is a denial of the equal protection of the laws enjoining by the 14th amendment. *Brown* v. *Board of Education* (347 U.S. 483). The court postponed, pending further argument, formulation of a decree to effectuate this decision. That degree was rendered May 31, 1955. *Brown* v. *Board of Education* (349 U.S. 294). In the formulation of that decree, the court recognized that good faith compliance with the principles declared in *Brown* might in some situations "call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision." (Id., at 300). The court went on to state:

> Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic

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*The following was the Court's *per curiam* opinion:

"Per Curiam.

"The Court, having fully deliberated upon the oral arguments had on August 28, 1958, as supplemented by the arguments presented on September 11, 1958, and all the briefs on file, is unanimously of the opinion that the judgment of the Court of Appeals for the Eighth Circuit of August 18, 1958, 257 F. 2d 33, must be affirmed. In view of the imminent commencement of the new school year at the Central High School of Little Rock, Arkansas, we deem it important to make prompt announcement of our judgment affirming the Court of Appeals. The expression of the views supporting our judgment will be prepared and announced in due course.

"It is accordingly ordered that the judgment of the Court of Appeals for the Eighth Circuit, dated August 18, 1958, 257 F. 2d 33, reversing the judgment of the District Court for the Eastern District of Arkansas, dated June 20, 1958, 163 F. Supp. 13, be affirmed, and that the judgments of the District Court for the Eastern District of Arkansas, dated August 28, 1965, see 143 F. Supp. 855, and September 3, 1957, enforcing the School Board's plan for desegregation in compliance with the decision of this Court in *Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294, be reinstated. It follows that the order of the Court of Appeals dated August 21, 1958, staying its own mandate is of no further effect.

"The judgment of this Court shall be effective immediately, and shall be communicated forthwith to the District Court for the Eastern District of Arkansas."

> and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.
>
> While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.

349 U.S., at 300–301.

Under such circumstances, the district courts were directed to require "a prompt and reasonable start toward full compliance," and to take such action as was necessary to bring about the end of racial segregation in the public schools "with all deliberate speed." Ibid. Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a district court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. It was made plain that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance. State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system.

On May 20, 1954, 3 days after the first *Brown* opinion, the Little Rock District School Board adopted, and on May 23, 1954, made public, a statement of policy entitled "Supreme Court Decision—Segregation in Public Schools." In this statement the board recognized that:

> It is our responsibility to comply with Federal constitutional requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed.

Thereafter the board undertook studies of the administrative problems confronting the transition to a desegregated public school system at Little Rock. It instructed the superintendent of schools to prepare a plan for desegregation, and approved such a plan on May 24, 1955, 7 days before the second *Brown* opinion. The plan provided for desegregation at the senior high school level (grades 10 through 12) as the first stage. Desegregation at the junior high and elementary levels was to follow. It was contemplated that desegregation at the high school level would commence in the fall of 1957, and the expectation was that complete desegregation of the school system would be accomplished by 1963. Following the adoption of this plan, the superintendent of schools discussed it with a large number of citizen groups in the city. As a result of these discussions, the board reached the conclusion that "a large majority of the residents" of Little Rock were of "the belief . . . that the plan, although objectionable in principle," from the point of view of those supporting segregated schools, "was still the best for the interests of all pupils in the district."

Upon challenge by a group of Negro plaintiffs desiring more rapid completion of the desegregation process, the district court upheld the school board's plan. *Aaron* v. *Cooper* (143 F.Supp. 855). The court of appeals affirmed (243 F.2d 361). Review of that judgment was not sought here.

While the school board was thus going forward with its preparation for desegregating the Little Rock school system, other State authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this court had held violated the 14th amendment. First came, in November 1956, an amendment to the State constitution flatly commanding the Arkansas General Assembly to oppose "in every constitutional manner the unconstitutional desegregation decisions of May 17, 1954, and May 31, 1955, of the U.S. Supreme Court," Arkansas Constitutional Amendment 44, and, through the initiative, a pupil assignment law (Arkansas Statute 80–1519 to 80–1524). Pursuant to this State constitutional command, a law relieving school children from compulsory attendance at racially mixed schools, Arkansas Statute 80–1525, and a law establishing a State Sovereignty Commission, Arkansas Statute 6–801 to 6–824, were enacted by the general assembly in February 1957.

The school board and the superintendent of schools nevertheless continued with preparations to carry out the first stage of the desegregation program. Nine Negro children were scheduled for admission in September 1957 to Central High School, which has more than 2,000 students. Various administrative measures, designed to assure the smooth transition of this first stage of desegregation, were undertaken.

On September 2, 1957, the day before these Negro students were to enter Central High, the school authorities were met with drastic opposing action on the part of the Governor of Arkansas who dispatched units of the Arkansas National Guard to the Central High School grounds and placed the school "off limits" to colored students. As found by the district court in subsequent proceedings, the Governor's action had not been requested by the school authorities, and was entirely unheralded. The findings were these:

> Up to this time [September 2], no crowds had gathered about Central High School and no acts of violence or threats of violence in connection with the carrying out of the plan

> had occurred. Nevertheless, out of an abundance of caution, the school authorities had frequently conferred with the mayor and Chief of Police of Little Rock about taking appropriate steps by the Little Rock police to prevent any possible disturbances or acts of violence in connection with the attendance of the nine colored students at Central High School. The mayor considered that the Little Rock Police force could adequately cope with any incidents which might arise at the opening of school. The mayor, the chief of police, and the school authorities made no request to the Governor or any representative of his for State assistance in maintaining peace and order at Central High School. Neither the Governor nor any other official of the State government consulted with the Little Rock authorities about whether the Little Rock Police were prepared to cope with any incidents which might arise at the school, about any need for State assistance in maintaining peace and order, or about stationing the Arkansas National Guard at Central High School.

Aaron v. *Cooper* (156 F.Supp. 220, 225).

The board's petition for postponement in this proceeding states:

> The effect of that action [of the Governor] was to harden the core of opposition to the plan and cause many persons who theretofore had reluctantly accepted the plan to believe there was some power in the State of Arkansas which, when exerted, could nullify the Federal law and permit disobedience of the decree of this [district] court, and from that date hostility to the plan was increased and criticism of the officials of the [school] district has become more bitter and unrestrained.

The Governor's action caused the school board to request the Negro students on September 2 not to attend the high school "until the legal dilemma was solved." The next day, September 3, 1957, the board petitioned the district court for instructions, and the court, after a hearing, found that the board's request of the Negro students to stay away from the high school had been made because of the stationing of the military guards by the State authorities. The court determined that this was not a reason for departing from the approved plan, and ordered the school board and superintendent to proceed with it.

On the morning of the next day, September 4, 1957, the Negro children attempted to enter the high school but, as the district court later found, units of the Arkansas National Guard "acting pursuant to the Governor's order, stood shoulder to shoulder at the school grounds and thereby forcibly prevented the nine Negro students . . . from entering," as they continued to do every schoolday during the following 3 weeks. (156 F.Supp., at 225.)

That same day, September 4, 1957, the U.S. attorney for the Eastern District of Arkansas was requested by the district court to begin an immediate investigation in order to fix responsibility for the interference with the orderly implementation of the district court's direction to carry out the desegregation program. Three days later, September 7, the district court denied a petition of the school board and the superintendent of schools for an order temporarily suspending continuance of the program.

Upon completion of the U.S. attorney's investigation, he and the Attorney General of the United States, at the district court's request, entered the proceedings and filed a petition on behalf of the United States, as *amicus curiae*, to enjoin the Governor of Arkansas and officers of the Arkansas National Guard from further attempts to prevent obedience to the court's order. After hearings on the petition, the district court found that the school board's plan had been obstructed by the Governor through the use of National Guard troops, and granted a preliminary injunction on September 20, 1957, enjoining the Governor and the officers of the Guard from preventing the attendance of Negro children at Central High School, and from otherwise obstructing or interfering with the orders of the court in connection with the plan, (156 F. Supp. 220, affirmed, *Faubus* v. *United States*, 254 F. 2d 797). The National Guard was then withdrawn from the school.

The next school day was Monday, September 23, 1957. The Negro children entered the high school that morning under the protection of the Little Rock Police Department and members of the Arkansas State Police. But the officers caused the children to be removed from the school during the morning because they had difficulty controlling a large and demonstrating crowd which had gathered at the high school. (163 F.Supp., at 16). On September 25 however, the President of the United States dispatched Federal troops to Central High School and admission of the Negro students to the school was thereby effected. Regular army troops continued at the high school until November 27, 1957. They were then replaced by federalized National Guardsmen who remained throughout the balance of the school year. Eight of the Negro students remained in attendance at the school throughout the school year.

We come now to the aspect of the proceedings presently before us. On February 20, 1958, the school board and the superintendent of schools filed a petition in the district court seeking a postponement of their program for desegregation. Their position in essence was that because of extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of the Governor and the legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible. The board therefore proposed that the Negro students already admitted to the school be withdrawn and sent to segregated schools, and that all further steps to carry out the board's desegregation program be postponed for a period later suggested by the board to be 2½ years.

After a hearing the district court granted the relief requested by the board. Among other things the court found that the past year at Central High School had been attended by conditions of "chaos, bedlam, and turmoil;" that there were "repeated incidents of more or less serious violence directed against the Negro students and their property;" that there was "tension and unrest among the school administrators, the classroom teachers, the pupils, and the latters' parents, which inevitably had an adverse effect upon the educational program;" that a school official was threatened with violence; that a "serious financial burden" had been cast on the school district; that the education of the students had suffered "and under existing conditions will continue to suffer;" that the board would continue to need "military assistance or its equivalent;" that the local police department would not be able "to detail enough men to afford the necessary protection;" and that the situation was "intolerable," (163 F.Supp., at 20–26).

The district court's judgment was dated June 20, 1958. The Negro respondents appealed to the court of appeals for the eighth circuit and also sought there a stay of the district court's judgment. At the same time they filed a petition for certiorari in this court asking us to review the district court's judgment without awaiting the disposition of their appeal to the court of appeals, or of their petition to that court for a stay. That we declined to do (357 U.S. 566). The court of appeals did not act on the petition for a stay, but, on August 18, 1958, after convening in special session on August 4 and hearing the appeal, reversed the district court (257 F.2d 33). On August 21, 1958, the Court of Appeals stayed its mandate to permit the school board to petition this court for certiorari. Pending the filing of the school board's petition for certiorari, the Negro respondents, on August 23, 1958, applied to Mr. Justice Whittaker, as circuit justice for the eighth circuit, to stay the order of the court of appeals withholding its own mandate and also to stay the district court's judgment. In view of the nature of the motions, he referred them to the entire court. Recognizing the vital importance of a decision of the issues in time to permit arrangements to be made for the 1958–59 school year, see *Aaron* v. *Cooper* (357 U.S. 566, 567), we convened in special term on August 28, 1958, and heard oral argument on the respondents' motions, and also argument of the Solicitor General who, by invitation, appeared for the United States as *amicus curiae*, and asserted that the court of appeals' judgment was clearly correct on the merits, and urged that we vacate its stay forthwith. Finding that respondents' application necessarily involved consideration of the merits of the litigation, we entered an order which deferred decision upon the motions pending the disposition of the school board's petition for certiorari, and fixed September 8, 1958, as the day on or before which such petition might be filed, and September 11, 1958, for oral argument upon the petition. The petition for certiorari duly filed, was granted in open court on September 11, 1958 (*post*, page 29), and further arguments were had, the Solicitor General again urging the correctness of the judgment of the court of appeals. On September 12, 1958, as already mentioned, we unanimously affirmed the judgment of the court of appeals in the *per curiam* opinion set forth in the margin at the outset of this opinion. *ante* (p. 5).

In affirming the judgment of the court of appeals which reversed the district court we have accepted without reservation the position of the school board, the superintendent of schools, and their counsel that they displayed entire good faith in the conduct of these proceedings and in dealing with the unfortunate and distressing sequence of events which has been outlined. We likewise have accepted the findings of the district court as to the conditions at Central High School during the 1957–58 school year, and also the findings that the educational progress of all the students, white and colored, of that school has suffered and will continue to suffer if the conditions which prevailed last year are permitted to continue.

The significance of these findings, however, is to be considered in light of the fact, indisputably revealed by the record before us, that the conditions they depict are directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this court's decision in the *Brown* case and which have brought about violent resistance to that decision in Arkansas. In its petition for certiorari filed in this court, the school board itself describes the situation in this language:

> The legislative, executive, and judicial departments of the State government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements villifying Federal law and Federal courts, and failing to utilize State law-enforcement agencies and judicial processes to maintain public peace.

One may well sympathize with the position of the board in the face of the frustrating conditions which have confronted it, but, regardless of the board's good faith, the actions of the other State agencies responsible for those conditions compel us to reject the board's legal position. Had Central High School been under the direct management of the State itself, it could hardly be suggested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of these respondents, when vindication of those rights was rendered difficult or impossible by the actions of other State officials. The situation here is in no different posture because the members of the School Board and the superintendent of schools are local officials; from the point of view of the 14th amendment, they stand in this litigation as the agents of the State.

The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Buchanan* v. *Warley* (245 U.S. 60, 81). Thus, law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the board's difficulties to a magnitude beyond its unaided power to control is the product of State action. Those difficulties, as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by State action.

The controlling legal principles are plain. The command of the 14th amendment is that no "State" shall deny to any person within its jurisdiction the equal protection of the laws. "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." *Ex parte Virginia* (100 U.S. 339, 347). Thus the prohibitions of the 14th amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see *Virginia* v. *Rives* (100 U.S. 313); *Pennsylvania* v. *Board of Directors of City Trusts of Philadelphia* (353 U.S. 230); *Shelley* v. *Kraemer* (334 U.S. 1); or whatever the guise in which it is taken, see *Derrington* v. *Plummer*, (240 F.2d 922); *Department of Conservation and Development* v. *Tate* (231 F.2d 615). In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by State legislators or State executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." *Smith* v. *Texas* (311 U.S. 128, 132).

What has been said, in the light of the facts developed is enough to dispose of the case. However, we should answer the premise of the actions of the Governor and legislature that they are not bound by our holding in the *Brown* case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

Article VI of the Constitution makes the Constitution the "supreme law of the land." In 1803, Chief Justice Marshall, speaking for a unanimous court, referring to the Constitution as "the fundamental and paramount law of the Nation," declared in the notable case of *Marbury* v. *Madison* (1 Cranch 137, 177), that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the Federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the 14th amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and article VI of the Constitution makes it of binding effect on the States "anything in the Constitution or laws of any State to the contrary notwithstanding." Every State legislator and executive and judicial officer is solemnly committed by oath taken pursuant to article VI, clause 3, "to support this Constitution." Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State . . ." (*Ableman* v. *Booth*, 21 How. 506, 524.)

No State legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery . . . ."

United States v. *Peters* (5 Cranch 115, 136). A Governor who asserts a power to nullify a Federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, "It is manifest that the fiat of a State Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of State power would be but impotent phrases . . . ." *Sterling* v. *Constantin* (287 U.S. 378, 397–398).

It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other State activity, must be exercised consistently with Federal constitutional requirements as they apply to State action. The Constitution created a Government dedicated to equal justice under law. The 14th amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law. *Bolling* v. *Sharpe* (347 U.S. 497). The basic decision in *Brown* was unanimously reached by this Court only after the case had been given the most serious consideration. Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.

Concurring Opinion of Mr. Justice Frankfurter.*

While unreservedly participating with my brethren in our joint opinion, I deem it appropriate also to deal individually with the great issue here at stake.

By working together, by sharing in a common effort, men of different minds and tempers, even if they do not reach agreement, acquire understanding and thereby tolerance of their differences. This process was underway in Little Rock. The detailed plan formulated by the Little Rock School Board, in the light of local circumstances, had been approved by the U.S. district court in Arkansas as satisfying the requirements of this Court's decree in *Brown* v. *Board of Education* (349 U.S. 294). The Little Rock School Board had embarked on an educational effort "to obtain public acceptance" of its plan. Thus the process of the community's accommodation to new demands of law upon it, the development of habits of acceptance of the right of colored children to the equal protection of the laws guaranteed by the Constitution, had peacefully and promisingly begun. The condition

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*[**Note**: This opinion was filed October 6, 1958.]

in Little Rock before this process was forcibly impeded by those in control of the government of Arkansas was thus described by the district court, and these findings of fact have not been controverted:

> 14. Up to this time, no crowds had gathered about Central High School and no acts of violence or threats of violence in connection with the carrying out of the plan had occurred. Nevertheless, out of an abundance of caution, the school authorities had frequently conferred with the mayor and chief of police of Little Rock about taking appropriate steps by the Little Rock police to prevent any possible disturbances or acts of violence in connection with the attendance of the nine colored students at Central High School. The mayor considered that the Little Rock police force could adequately cope with any incidents which might arise at the opening of school. The mayor, the chief of police, and the school authorities made no request to the Governor or any representative of his for State assistance in maintaining peace and order at Central High School. Neither the Governor nor any other official of the State government consulted with the Little Rock authorities about whether the Little Rock police were prepared to cope with any incidents which might arise at the school, about any need for State assistance in maintaining peace and order, or about stationing the Arkansas National Guard at Central High School (156 F. Supp. 220, 225).

All this was disrupted by the introduction of the State militia and by other obstructive measures taken by the State. The illegality of these interferences with the constitutional right of Negro children qualified to enter the Central High School is unaffected by whatever action or nonaction the Federal Government had seen fit to take. Nor is it neutralized by the undoubted good faith of the Little Rock School Board in endeavoring to discharge its constitutional duty.

The use of force to further obedience to law is in any event a last resort and one not congenial to the spirit of our Nation. But the tragic aspect of this disruptive tactic was that the power of the State was used not to sustain law but as an instrument for thwarting law. The State of Arkansas is thus responsible for disabling one of its subordinate agencies, the Little Rock School Board, from peacefully carrying out the Board's and the State's constitutional duty. Accordingly, while Arkansas is not a formal party in these proceedings and a decree cannot go against the State, it is legally and morally before the Court.

We are now asked to hold that the illegal, forcible interference by the State of Arkansas with the continuance of what the Constitution commands, and the consequences in disorder that it entrained, should be recognized as justification for undoing what the school board had formulated, what the district court in 1955 had directed to be carried out, and what was in process of obedience. No explanation that may be offered in support of such a request can obscure the inescapable meaning that law should bow to force. To yield to such a claim would be to enthrone official lawlessness, and lawlessness if not checked is the precursor of anarchy. On the few tragic occasions in the history of the Nation, North and South, when law was forcibly resisted or systematically evaded, it has signaled the breakdown of constitutional processes of government on which ultimately rest the liberties of all. Violent resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society. What could this mean but to acknowledge that disorder under the aegis of a State has moral superiority over the law of the Constitution? For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society. The State "must . . . yield to an authority that is paramount to the State." This language of command to a State is Mr. Justice Holmes', speaking for the Court that comprised Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Brandeis, Mr. Justice Sutherland, Mr. Justice Butler, and Mr. Justice Stone (*Wisconsin* v. *Illinois*, 281 U.S. 179, 197).

When defiance of law judicially pronounced was last sought to be justified before this Court, views were expressed which are now especially relevant:

> The historic phrase "a government of laws and not of men" epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights, he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. "A government of laws and not of men" was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court. Even this Court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law. The Court may be asked to reconsider its decisions, and this has been done successfully again and again throughout our history. Or what this Court has deemed its duty to decide may be changed by legislation, as it often has been, and, on occasion by constitutional amendment.
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> But from their own experience and their deep reading in history, the Founders knew that law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. "Civilization involves subjection of force to reason, and the agency of this subjection is law" (Pound, "The Future of Law" (1937) 47 Yale L. J. 1, 13.) The conception of a government by laws dominated the thoughts of those who founded this Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted, and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be "as free, impartial, and independent as the lot of humanity will admit." So strongly were the framers of the Constitution bent on securing a reign of law that they en-

> dowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for. *United States* v. *United Mine Workers*, 330 U.S. 258, 307–309 (concurring opinion).

The duty to abstain from resistance to "the supreme law of the land," U.S. Constitution, article VI, paragraph 2, as declared by the organ of our Government for ascertaining it, does not require immediate approval of it nor does it deny the right of dissent. Criticism need not be stilled. Active obstruction or defiance is barred. Our kind of society cannot endure if the controlling authority of the law as derived from the Constitution is not to be the tribunal specially charged with the duty of ascertaining and declaring what is "the supreme law of the land." (See President Andrew Jackson's message to Congress of January 16, 1833, II Richardson, "Messages and Papers of the Presidents" (1896 ed.), 610, 623.) Particularly is this so where the declaration of what "the supreme law" commands on an underlying moral issue is not the dubious pronouncement of a gravely divided Court but is the unanimous conclusion of a long-matured deliberative process. The Constitution is not the formulation of the merely personal views of the members of this Court, nor can its authority be reduced to the claim that State officials are its controlling interpreters. Local customs, however hardened by time, are not decreed in heaven. Habits and feelings they engender may be counteracted and moderated. Experience attests that such local habits and feelings will yield, gradually through this be, to law and education. And educational influences are exerted not only by explicit teaching. They vigorously flow from the fruitful exercise of the responsibility of those charged with political official power and from the almost unconsciously transforming actualities of living under law.

The process of ending unconstitutional exclusion of pupils from the common school system—"common" meaning shared alike—solely because of color is no doubt not an easy, overnight task in a few States where a drastic alteration in the ways of communities is involved. Deep emotions have, no doubt, been stirred. They will not be calmed by letting violence loose—violence and defiance employed and encouraged by those upon whom the duty of law observance should have the strongest claim—nor by submitting to it under whatever guise employed. Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms.

For carrying out the decision that color alone cannot bar a child from a public school, this Court has recognized the diversity of circumstances in local school situations. But is it a reasonable hope that the necessary endeavors for such adjustment will be furthered, that racial frictions will be ameliorated, by a reversal of the process and interrupting effective measures toward the necessary goal? The progress that has been made in respecting the constitutional rights of the Negro children, according to the graduated plan sanctioned by the two lower courts, would have to be retracted, perhaps with even greater difficulty because of deference to forcible resistance. It would have to be retraced against the seemingly vindicated feeling of those who actively sought to block that progress. Is there not the strongest reason for concluding that to accede to the board's request, on the basis of the circumstances that gave rise to it, for a suspension of the board's nonsegregation plan, would be but the beginning of a series of delays calculated to nullify this Court's adamant decisions in the *Brown* case that the Constitution precludes compulsory segregation based on color in State-supported schools?

That the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding, is especially true when they are confronted with a problem like a racially discriminating public school system. This is the lesson to be drawn from the heartening experience in ending enforced racial segregation in the public schools in cities with Negro populations of large proportions. Compliance with decisions of this court, as the constitutional organ of the supreme law of the land, has often, throughout our history, depended on active support by State and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the supreme law, precludes the maintenance of our Federal system as we have known and cherished it for 170 years.

Lincoln's appeal to "the better angels of our nature" failed to avert a fratricidal war. But the compassionate wisdom of Lincoln's first and second inaugurals bequeathed to the Union, cemented with blood, a moral heritage which, when drawn upon in times of stress and strife, is sure to find specific ways and means to surmount difficulties that may appear to be insurmountable.

GREEN *v.* NEW KENT COUNTY
391 U.S. 430 (1968)

CERTIORARI

TO THE U.S. COURT OF APPEALS FOR THE 4TH CIRCUIT

MAY 27, 1968

Mr. Justice BRENNAN delivered the opinion of the Court.

The question for decision is whether, under all the circumstances here, respondent school board's adoption of a "freedom-of-choice" plan which allows a pupil to choose his own public school constitutes adequate compliance with the board's responsibility "to achieve a system of determining admission to the public schools on a non-racial basis . . ." *Brown* v. *Board of Education*, 349 U.S. 294, 300–301 (*Brown II*).

Petitioners brought this action in March 1965 seeking injunctive relief against respondent's continued maintenance of an alleged racially segregated school system. New Kent County is a rural county in eastern Virginia. About one-half of its population of some 4,500 are Negroes. There is no residential segregation in the county; persons of both races reside throughout. The school system has only two schools, the New Kent school on the east side of the county and the George W. Watkins school on the west side. In a memorandum filed May 17, 1966, the district court found that the "school system serves approximately 1,300 pupils, of which 740 are Negro and 550 are white. The school board operates one white combined elementary and high school [New Kent], and one Negro combined elementary and high school [George W. Watkins]. There are no attendance zones. Each school serves the entire county." The record indicates that 21 school buses—11 serving the Watkins school and 10 serving the New Kent school—travel overlapping routes throughout the county to transport pupils to and from the two schools.

The segregated system was initially established and maintained under the compulsion of Virginia constitutional and statutory provisions mandating racial segregation in public education, Va. Const., Art. IX, § 140 (1902); Va. Code § 22–221 (1950). These provisions were held to violate the Federal Constitution in *Davis* v. *County School Board of Prince Edward County*, decided with *Brown* v. *Board of Education*, 347 U.S. 483, 487 (*Brown I*). The respondent School Board continued the segregated operation of the system after the *Brown* decisions, presumably on the authority of several statutes enacted by Virginia in resistance to those decisions. Some of these statutes were held to be unconstitutional on their face or as applied.[1] One statute, the Pupil Placement Act, Va. Code § 22–232.1 et seq. (1964), not repealed until 1966, divested local boards of authority to assign children to particular schools and placed that authority in a State Pupil Placement Board. Under that act, children were each year automatically reassigned to the school previously attended unless upon their application the State board assigned them to another school; students seeking enrollment for the first time were also assigned at the discretion of the State board. To September 1964, no Negro pupil had applied for admission to the New Kent school under this statute, and no white pupil had applied for admission to the Watkins school.

The school board initially sought dismissal of this suit on the ground that petitioners had failed to apply to the State board for assignment to New Kent school. However, on August 2, 1965, 5 months after the suit was brought, respondent school board, in order to remain eligible for Federal financial aid, adopted a "freedom-of-choice" plan for desegregating the schools.[2] Under that plan, each pupil may annually choose between the New Kent and Watkins schools and, except for the first and eighth grades, pupils not making a choice are assigned to the school previously attended; first and eighth grade pupils must affirmatively choose a school. After the plan was filed, the district court denied petitioner's prayer for an injunction and granted respondent leave to submit an amendment to the plan with respect to employment and assignment of teacher and staff on a racially nondiscriminatory basis. The amendment was duly filed and on June 28, 1966, the district court approved the "freedom-of-choice" plan as so amended. The Court of Appeals for the Fourth Circuit, en banc, 382 F.2d 326, 338,[3] affirmed the district court's approval of the "freedom-of-choice" provisions of the plan but remanded the case to the district court for entry of an order regarding faculty "which is much more specific and more comprehensive" and which would incorporate in addition to a "minimal, objective timetable" some of the faculty provisions of the decree entered by the Court of Appeals for the Fifth Circuit in *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, aff'd en banc, 380 F.2d 385 (1967). Judges Sobeloff and Winters concurred with the remand on the teacher issue but otherwise disagreed, expressing the view "that the district court should be directed . . . also to set up procedures for periodically evaluating the effectiveness of the [board's] 'freedom of choice' [plan] in the elimination of other features of a segregated school system." 382 F.2d, at 330. We granted certiorari, 389 U.S. 1003.

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[1] *E.g., Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218; *Green* v. *School Board of City of Roanoke*, 304 F.2d 118 (C.A. 4th Cir. 1962); *Adkins* v. *School Board of City of Newport News*, 148 F. Supp. 430 (D.C.E.D. Va.), aff'd. 246 F.2d 325 (C.A. 4th Cir. 1957); *James* v. *Almond*, 170 F. Supp. 331 (D.C.E.D. Va. 1959); *Harrison* v. *Day*, 200 Va. 439, 106 S.E.2d 636 (1959).

[2] Congress, concerned with the lack of progress in school desegregation, included provisions in the Civil Rights Act of 1964 to deal with the problem through various agencies of the Federal Government. 42 U.S.C. §§ 2000c *et seq.*, 2000d *et seq.*, 2000h–2. In Title VI Congress declared that

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program of activity receiving Federal assistance." 42 U.S.C. § 2000d.

The Department of Health, Education, and Welfare issued regulations covering racial discrimination in federally aided school systems, as directed by 42 U.S.C. § 2000d–1, and in a statement of policies or "guidelines," the Department's Office of Education established standards according to which school systems in the process of desegregation can remain qualified for federal funds. 45 CFR §§ 80.1–80.13, 181.1–181.76 (1967). "Freedom-of-choice" plans are among those considered acceptable, so long as in operation such a plan proves effective. 45 CFR § 181.54. The regulations provide that a school system "subject to a final order of a court of the United States for the desegregation of such school . . . system" with which the system agrees to comply is deemed to be in accordance with the statute and regulations. 45 CFR § 80.4(c). See also 45 CFR § 181.6. See generally Dunn, Title VI, the Guidelines and School Desegregation in the South, 53 Va. L. Rev. 42 (1967); Note, 55 Geo. L. J. 325 (1966); Comment, 77 Yale L. J. 321 (1967).

[3] This case was decided *per curiam* on the basis of the opinion in *Bowman* v. *County School Board of Charles City County*, 382 F. 2d 326, decided the same day. Certiorari has not been sought for the *Bowman* case itself.

The pattern of separate "white" and "Negro" schools in the New Kent County school system established under compulsion of State laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro schoolchildren equal protection of the laws. Racial identification of the system's school was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part "white" and part "Negro."

It was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were required by *Brown II* "to effectuate a transition to a racially nondiscriminatory school system." 349 U.S., at 301. It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the "white" schools. See, for example, *Cooper* v. *Aaron*, 358 U.S. 1. Under *Brown II* that immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about; it was because of the "complexities arising from the transition to a system of public education freed of racial discrimination" that we provided for "all deliberate speed" in the implementation of the principles of *Brown I*. 349 U.S., at 299–301. Thus we recognized the task would necessarily involve solution of "varied local school problems." Id., at 299. In referring to the "personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis," we also noted that "[t]o effectuate this interest may call for elimination of a variety of obstacles in making the transition . . ." Id., at 300. Yet we emphasized that the constitutional rights of Negro children required school officials to bear the burden of establishing that additional time to carry out the ruling in an effective manner "is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." Ibid. We charged the district courts in their review of particular situations to—

> . . . consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. Id., at 300–301.

It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent school board's "freedom-of-choice" plan to achieve that end. The school board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the 14th amendment as universally requiring "compulsory integration," a reading it insists the wording of the amendment will not support. But that argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the State-imposed segregated pattern of long standing, the fact that in 1965 the board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating State-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. See *Cooper* v. *Aaron*, *supra*, at 7; *Bradley* v. *School Board*, 382 U.S. 103; cf. *Watson* v. *City of Memphis*, 373 U.S. 523. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this: and it was to this end that *Brown II* commanded school boards to bend their efforts.[4]

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[4] "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discriminations in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154. Compare the remedies discussed in, *e.g.*, *NLRB* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173; *United States* v. *Standard Oil Co.*, 221 U.S. 1. See also *Griffin* v. *County School Board*, 377 U.S. 218, 232–234.

In determining whether respondent school board met that command by adopting its freedom-of-choice plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable for "the governing constitutional principles no longer bear the imprint of newly enunciated doctrine." *Watson* v. *City of Memphis, supra*, at 529; see *Bradley* v. *School Board, supra; Rogers* v. *Paul*, 382 U.S. 198. Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," *Griffin* v. *County School Board*, 377 U.S. 218, 234; "the context in which we must interpret and apply this language (of *Brown II*) to plans for desegregation has been significantly altered." *Goss* v. *Board of Education*, 373 U.S. 683, 689. See *Calhoun* v. *Latimer*, 377 U.S. 263. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing State-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the State-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief. Of course, where other, more promising courses of action are open to the board, that may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that State-imposed segregation has been completely removed. See No. 805 *Raney* v. *Board of Education, post*, at page 5.

We do not hold that freedom of choice can have no place in such a plan. We do not hold that a freedom-of-choice plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing freedom of choice is not an end in itself. As Judge Sobeloff has put it—

> "Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be

> necessary to create a "unitary, nonracial system." *Bowman* v. *County School Board*, 382 F. 2d 326, 333 (C. A. 4th Cir. 1967) (concurring opinion). Accord, *Kemp* v. *Beasley*, 389 F. 2d 178 (C.A. 8th Cir. 1968); *United States* v. *Jefferson County Board of Education*, *supra.*

Although the general experience under freedom of choice to date has been such as to indicate its ineffectiveness as a tool of desegregation,[5] there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a State-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, freedom of choice must be held unacceptable.

The New Kent school board's freedom-of-choice plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system. In 3 years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85 percent of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the school board. The board must be required to formulate a new plan and, in light of other courses which appear open to the board, such as zoning,[6] fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.

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[5] The views of the United States Commission on Civil Rights, which we neither adopt nor refuse to adopt, are as follows:

"Freedom of choice plans, which have tended to perpetuate racially identifiable schools in the Southern and border States, require affirmative action by both Negro and white parents and pupils before such disestablishment can be achieved. There are a number of factors which have prevented such affirmative action by substantial numbers of parents and pupils of both races:

"(a) Fear of retaliation and hostility from the white community continue to deter many Negro families from choosing formerly all-white schools;

"(b) During the past school year [1966–1967], as in the previous year, in some areas of the South, Negro families with children attending previously all-white schools under free choice plans were targets of violence, threats of violence and economic reprisals by white persons and Negro children were subjected to harassment by white classmates notwithstanding conscientious efforts by many teachers and principals to prevent such misconduct;

"(c) During the past school year, in some areas of the South public officials improperly influenced Negro families to keep their children in Negro schools and excluded Negro children attending formerly all-white schools from official functions;

"(d) Poverty deters many Negro families in the South from choosing formerly all-white schools. Some Negro parents are embarrassed to permit their children to attend such schools without suitable clothing. In some districts special fees are assessed for courses which are available only in the white schools;

"(e) Improvements in facilities and equipment . . . have been instituted in all-Negro schools in some school districts in a manner that tends to discourage Negroes from selecting white schools."

Southern School Desegregation, 1966–1967, at 88 (1967). See *id.*, at 45–69; Survey of School Desegregation in the Southern and Border States 1965–1966, at 30–44, 51–52 (U.S. Comm'n on Civil Rights 1966).

The judgment of the court of appeals is vacated insofar as it affirmed the district court and the case is remanded to the district court for further proceedings consistent with this opinion.

It is so ordered.

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[6] "In view of the situation found in New Kent County, where there is no residential segregation, the elimination of the dual school system and the establishment of a 'unitary, non-racial system' could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School. Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the 'Negro' school, and the white children to the 'white' school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning. The conditions in this county present a classical case for this expedient." *Bowman* v. *County School Board*, *supra*, n. 3, at 332 (concurring opinion).

Petitioners have also suggested that the Board could consolidate the two schools, one site (*e.g.* Watkins) serving grades 1–7 and the other (*e.g.*, New Kent) serving grades 8–12, this being the grade division respondent makes between elementary and secondary levels. Petitioners contend this would result in a more efficient system by eliminating costly duplication in this relatively small district while at the same time achieving immediate dismantling of the dual system.

These are two suggestions the District Court should take into account upon remand, along with any other proposed alternatives and in light of considerations respecting other aspects of the school system such as the matter of faculty and staff desegregation remanded to the court by the Court of Appeals.

ALEXANDER *v.* HOLMES

396 U.S. 19 (1969)

CERTIORARI

TO THE U.S. COURT OF APPEALS FOR THE 5TH CIRCUIT

OCTOBER 29, 1969—PER CURIAM

These cases come to the Court on a petition for certiorari to the Court of Appeals for the Fifth Circuit. The petition was granted on October 9, 1969, and the case set down for early argument. The question presented is one of paramount importance, involving as it does the denial of fundamental rights to many thousands of school children, who are presently attending Mississippi schools under segregated conditions contrary to the applicable decisions of this Court. Against this background the court of appeals should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. *Griffin* v. *School Board*, 377 U.S. 218, 234 (1964); *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 438–439, 442 (1968). Accordingly,

It is hereby adjudged, ordered, and decreed:

1. The court of appeals' order of August 28, 1969, is vacated, and the cases are remanded to that court to issue its decree and order, effective immediately, declaring that each of the school disrticts here involved may no longer operate a dual school system based on race or color, and directing that they begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color.

2. The court of appeals may in its discretion direct the schools here involved to accept all or any part of the August 11, 1969, recommendations of the Department of Health, Education, and Welfare, with any modifications which that court deems proper insofar as those recommendations insure a totally unitary school system for all eligible pupils without regard to race or color.

The court of appeals may make its determination and enter its order without further arguments or submissions.

3. While each of these school systems is being operated as a unitary system under the order of the court of appeals, the district court may hear and consider objections thereto or proposed amendments thereof, provided, however, that the court of ap-

peals' order shall be complied with in all respects while the district court considers such objections or amendments, if any are made. No amendment shall become effective before being passed upon by the court of appeals.

4. The court of appeals shall retain jurisdiction to insure prompt and faithful compliance with its order, and may modify or amend the same as may be deemed necessary or desirable for the operation of a unitary school system.

5. The order of the court of appeals dated August 28, 1969, having been vacated and the case remanded for proceedings in conformity with this order, the judgment shall issue forthwith and the court of appeals is requested to give priority to the execution of this judgment as far as possible and necessary.

CARTER *v.* WEST FELICIANA PARISH

396 U.S. 226 (1970)

ON APPLICATION

TO THE HON. HUGO L. BLACK, CIRCUIT JUSTICE FOR THE 5TH CIRCUIT

FOR A TEMPORARY INJUNCTIVE ORDER

No. 944—Decided December 13, 1969

Petitioners, whose petition for certiorari seeks review of a court of appeals ruling authorizing a delay in student desegregation in three Louisiana school districts until September 1970, are—pending disposition of their petition—granted temporary injunctive relief requiring the respondent school boards to take the necessary preliminary steps to effectuate complete student desegregation by February 1, 1970, *Alexander* v. *Holmes County Board of Education*, *ante*, p. 19.

See 419 F.2d 1211.

APPLICATION GRANTED

And Judgment Vacated in Part

Richard B. Sobol, Murphy W. Bell, Robert F. Collins, Norman C. Amaker, and Melvyn Zarr for *petitioners*.

This matter reaches the court on an application presented to Mr. Justice Black, as circuit justice for the fifth circuit, seeking a temporary injunctive order and other relief; and it appearing that:

1. Three cases were originally filed in 1965, seeking the desegregation of three Louisiana school districts.
2. Pursuant to orders of the district courts, in July of this year the Office of Education of the United States Department of Health, Education, and Welfare prepared and submitted terminal desegregation plans for each of the districts here involved for the school year 1969–70. These plans were rejected by the district courts.
3. The district courts' orders were reversed by the U.S. Court of Appeals for the Fifth Circuit sitting en banc, on December 1, 1969, subsequent to this court's decision in *Alexander* v. *Holmes County Board of Education*, *ante*, at 19. That court ordered respondent school boards and 13 other school boards to desegregate faculties completely and to adopt plans for conversion to unitary school systems by February 1, 1970, but authorized a delay in pupil desegregation until September 1970.
4. On December 10, 1969, petitioners filed in this court a petition for a writ of certiorari, together with a motion to advance consideration of the petition and a motion for summary disposi-

tion, contending that the decision of the court of appeals is inconsistent with this court's decision in *Alexander* v. *Holmes County Board of Education, supra.* The relief sought on the merits is the implementation of the Department of Health, Education, and Welfare plans for student assignment on or before February 1, 1970, simultaneous with the other steps ordered by the court of appeals.

5. Petitioners, by this application seek a temporary injunctive order:

> . . . requiring the respondent school boards, pending a decision by this court on the merits, to take all necessary clerical and administrative steps—such as determining new student assignments, bus routes and athletic schedules, and preparing for any necessary physical changes—preparatory to complete conversion under the HEW plans by February 1, 1970. If petitioners are successful, the administrative and clerical tasks necessary to conversion will have been undertaken roughly according to the timetable established by the court below in the *Alexander* cases, and petitioners' right to effective relief will not have been put in question by the passage of time. If petitioners are unsuccessful in this court, the school boards would be under no compulsion to convert during this school year.

Application to the Honorable Hugo L. Black, circuit justice for the fifth circuit, for a temporary injunctive order 3–4. [Footnote omitted.]

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED

1. Petitioners' application for a temporary injunctive order requiring the respondent school boards to take such preliminary steps as may be necessary to prepare for complete student desegregation by February 1, 1970, is granted (*Alexander* v. *Holmes County Board of Education, supra*).

2. By way of interim relief, and pending this court's disposition of the petition for certiorari, the judgment of the court of appeals is vacated insofar as it deferred desegregation of schools until the school year 1970–71.

3. By way of interim relief pending further order of this Court, the respondent school boards are directed to take no steps which are inconsistent with, or which will tend to prejudice or delay, a schedule to implement on or before February 1, 1970, desegregation plans submitted by the Department of Health, Education, and Welfare for student assignment simultaneous with the other steps ordered by the court of appeals.

4. The respondents are directed to file any response to the petition herein on or before January 2, 1970.

CERTIORARI

TO THE U.S. COURT OF APPEALS FOR THE 5TH CIRCUIT

No. 944. Decided January 14, 1970*

CERTIORARI GRANTED

419 F.2d 1211—Reversed and Remanded

Richard B. Sobol, Murphy W. Bell, Robert F. Collins, Norman C. Amaker, and Melvyn Zarr for *petitioners* in *No. 944*. Jack Greenberg, James M. Nabrit III, Mr. Amaker, Mr. Zarr, Oscar W. Adams, Jr., John H. Ruffin, Jr., and Earl M. Johnson for *petitioners in No. 972*.

John F. Ward, Jr., for *respondents in No. 944*. Robert C. Cannada and Thomas H. Watkins for Jackson Municipal Separate School District et al., Hardy Lott for Marshall County Board of Education, Reid B. Barnes for Jefferson County Board of Education, Edwin L. Brobston for the Board of Education of the City of Bessemer et al., Palmer Pillans and George F. Wood for Board of School Commissioners of Mobile County et al., Frank C. Jones and Wallace Miller, Jr., for Bibb County Board of Education et al., H. A. Aultman for Houston County Board of Education, W. Fred Turner for Board of Public Instruction of Bay County, and Sam T. Dell, Jr., for Board of Public Instruction of Alachua County et al., *respondents in No. 972*.

Briefs of *amici curiae in Nos. 944 and 972* were filed by Solicitor General Griswold for the United States, and by Mr. Ward for the Louisiana Teachers Association. Rivers Buford, Jr., and Gerald Mager filed a brief for the State Board of Education of Florida as *amicus curiae in No. 972*.

Insofar as the court of appeals authorized deferral of student desegregation beyond February 1, 1970, that court misconstrued our holding in *Alexander* v. *Holmes County Board of Education*, *ante*, page 19. Accordingly, the petitions for writs of certiorari are granted, the judgments of the court of appeals are reversed, and the cases remanded to that court for further proceedings consistent with this opinion. The judgments in these cases are to issue forthwith.

Mr. Justice Harlan, with whom Mr. Justice White joins, concurring.

I join the Court's order. I agree that the action of the court of appeals in these cases does not fulfill the requirements of our recent decision in *Alexander* v. *Holmes County Board of Education*, *ante*, page 19, and accordingly that the judgments below cannot stand. However, in fairness to the court of appeals and to the parties, and with a view to giving further guidance to litigants in future cases of this kind, I consider that something more is due to be said respecting the intended effect of the *Alexander* decision. Since the Court has not seen fit to do so, I am constrained to set forth at least my own understanding of the procedure to be followed in these cases. Because of the shortness of the time available, I must necessarily do this in a summary way.

The intent of *Alexander*, as I see it, was that the burden in actions of this type should be shifted from plaintiffs, seeking redress for a denial of constitutional rights, to defendant school boards. What this means is that upon a prima facie showing of noncompliance with this Court's holding in *Green* v. *County School Board of New Kent County* (391 U.S. 430 (1968)) sufficient to demonstrate a likelihood of success at trial, plaintiffs may apply for immediate relief that will at once extirpate any lingering vestiges of a constitutionally prohibited dual school system. Compare *Magnum Import Co.* v. *Coty* (262 U.S. 159 (1923)).

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* **Together with No. 972, *Singleton et al.* v. *Jackson Municipal Separate School District et al.*, also on petition for writ of certiorari to the same court.**

Such relief, I believe it was intended, should consist of an order providing measures for achieving disestablishment of segregated school systems, and should, if appropriate, include provisions for pupil and teacher reassignments, rezoning, or any other steps necessary to accomplish the desegregation of the public school system as required by *Green*. Graduated implementation of the relief is no longer constitutionally permissible. Such relief shall become effective immediately after the courts, acting with dispatch, have formulated and approved an order that will achieve complete disestablishment of all aspects of a segregated public school system.

It was contemplated, I think, that in determining the character of such relief, the courts may consider submissions of the parties or any recommendations of the Department of Health, Education, and Welfare that may exist or may request proposals from the Department of Health, Education, and Welfare. If Department recommendations are already available, the school districts are to bear the burden of demonstrating beyond question, after a hearing, the unworkability of the proposals, and if such proposals are found unworkable, the courts shall devise measures to provide the required relief. It would suffice that such measures will tend to accomplish the goals set forth in *Green*, and, if they are less than educationally perfect, proposals for amendments may thereafter be made. Such proposals for amendments are in no way to suspend the relief granted in accordance with the requirements of *Alexander*.

Alexander makes clear that any order so approved should thereafter be implemented in the minimum time necessary for accomplishing whatever physical steps are required to permit transfers of students and personnel or other changes that may be necessary to effectuate the required relief. Were the recent orders of the Court of Appeals for the Fifth Circuit in *United States* v. *Hinds County School Board* (423 F. 2d 1264 (November 7, 1969)), and that of the Fourth Circuit in *Nesbit* v. *Statesville City Board of Education* (418 F. 2d 1040 (December 2, 1969)), each implementing in those cases our decision in *Alexander*, to be taken as a yardstick, this would lead to the conclusion that in no event should the time from the finding of noncompliance with the requirements of the *Green* case to the time of the actual operative effect of the relief, including the time for judicial approval and review, exceed a period of approximately 8 weeks. This, I think, is indeed the "maximum" timetable established by the Court today for cases of this kind.

Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Marshall express their disagreement with the opinion of Mr. Justice Harlan, joined by Mr. Justice White. They believe that those views retreat from our holding in *Alexander* v. *Holmes County Board of Education*, *ante*, at 20, that "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."

Memorandum of The CHIEF JUSTICE and Mr. Justice STEWART.

We would not peremptorily reverse the judgments of the Court of Appeals for the Fifth Circuit. That court, sitting en banc and acting unanimously after our decision in *Alexander* v. *Holmes County Board of Education*, *ante*, p. 19, has required the respondents to effect desegregation in their public schools by February 1, 1970, save for the student bodies, which are to be wholly desegregated during the current year, no later than September. In light of the measures the Court of Appeals has directed the respondent school districts to undertake, with total desegregation required for the upcoming school year, we are not prepared summarily to set aside its judgments. That court is far more familiar than we with the various situations of these several school districts, some large, some small, some rural, and some metropolitan, and has exhibited responsibility and fidelity to the objectives of our holdings in school desegregation cases. To say peremptorily that the Court of Appeals erred in its application of the *Alexander* doctrine to these cases, and to direct summary reversal without argument and without opportunity for exploration of the varying problems of individual school districts, seems unsound to us.

SWANN *v.* CHARLOTTE-MECKLENBURG

402 U.S. 1 (1971)

CERTIORARI

TO THE U.S. COURT OF APPEALS FOR THE 4TH CIRCUIT

No. 281. ARGUED OCTOBER 12, 1970—DECIDED APRIL 20, 1971 [1]

The Charlotte-Mecklenburg school system, which includes the city of Charlotte, N.C., had more than 84,000 students in 107 schools in the 1968–1969 school year. Approximately 29 percent (24,000) of the pupils were Negro, about 1,400 of whom attended 21 schools that were at least 99 percent Negro. This resulted from a desegregation plan approved by the district court in 1965, at the commencement of this litigation. In 1968, petitioner Swann moved for further relief based on *Green* v. *County School Board*, 391 U.S. 430, which required school boards to "come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that State-imposed segregation has been completely removed." The district court ordered the school board in April 1969 to provide a plan for faculty and student desegregation. Finding the board's submission unsatisfactory, the district court appointed an expert to submit a desegregation plan. In February 1970, the expert and the board presented plans, and the court adopted the board's plan, as modified, for the junior and senior high schools, and the expert's proposed plan for the elemtntary schools. The court of appeals affirmed the district court's order as to faculty desegregation and the secondary school plans, but vacated the order respecting elementary schools, fearing that the provisions for pairing and grouping of elementary schools would unreasonably burden the pupils and the board. The case was remanded to the district court for reconsideration and submission of further plans. This court granted certiorari and directed reinstatement of the district court's order pending further proceedings in that court. On remand the district court received two new plans, and ordered the board to adopt a plan, or the expert's plan would remain in effect. After the board "acquiesced" in the expert's plan, the district court directed that it remain in effect. *Held:*

1. Today's objective is to eliminate from the public schools all vestiges of State-imposed segregation that was held violative of equal protection guarantees by *Brown* v. *Board of Education*, 347 U.S. 483, in 1954. Pages 10–11.
2. In default by the school authorities of their affirmative obligation to proffer acceptable remedies, the district courts have

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[1] Together with No. 349, *Charlotte-Mecklenburg Board of Education et al.* v. *Swann et al.*, also on certiorari to the same court.

broad power to fashion remedies that will assure unitary school systems. Pages 11–12.

3. Title IV of the Civil Rights Act of 1964 does not restrict or withdraw from the Federal courts their historic equitable remedial powers. The proviso in 42 U.S.C. § 2000c–6 was designed simply to foreclose any interpretation of the Act as expanding the existing powers of the Federal courts to enforce the Equal Protection Clause. Pages 12–13.

4. Policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities are among the most important indicia of a segregated system, and the first remedial responsibility of school authorities is to eliminate invidious racial distinctions in those respects. Normal administrative practice should then produce schools of like quality, facilities, and staffs. Page 14.

5. The Constitution does not prohibit district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. *United States* v. *Montgomery County Board of Education*, 395 U.S. 225, was properly followed by the lower courts in this case. Pages 14–16.

6. In devising remedies to eliminate legally imposed segregation, local authorities and district courts must see to it that future school construction and abandonment are not used and do not serve to perpetuate or reestablish a dual system. Pages 16–17.

7. Four problem areas exist on the issue of student assignment:

(1) *Racial quotas.* The constitutional command to desegregate schools does not mean that every school in the community must always reflect the racial composition of the system as a whole; here the district court's very limited use of the racial ratio—not as an inflexible requirement, but as a starting point in shaping a remedy—was within its equitable discretion. Pages 18–21.

(2) *One-race schools.* While the existence of a small number of one-race, or virtually one-race, schools does not in itself denote a system that still practices segregation by law, the court should scrutinize such schools and require the school authorities to satisfy the court that the racial composition does not result from present or past discriminatory action on their part. Pp. 21–22.

An optional majority-to-minority transfer provision has long been recognized as a useful part of a desegregation plan, and to be effective such arrangement must provide the transferring student free transportation and available space in the school to which he desires to move. P. 22.

(3) *Attendance zones.* The remedial altering of attendance zones is not, as an interim corrective measure, beyond the remedial powers of a district court. A student assignment plan is not acceptable merely because it appears to be neutral, for such a plan may fail to counteract the continuing effects of past school segregation. The pairing and grouping of noncontiguous zones is a permissible tool; judicial steps going beyond contiguous zones should be examined in light of the objectives to be sought. No rigid rules can be laid down to govern conditions in different localities. Pp. 23–25.

(4) *Transportation.* The district court's conclusion that assignment of children to the school nearest their home serving their grade would not effectively dismantle the dual school system is supported by the record, and the remedial technique of requiring bus transportation as a tool of school desegregation was within that court's power to provide equitable relief. An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process; limits on traveltime will vary with many factors, but probably with none more than the age of the students. Pp. 25–27.

8. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once a unitary system has been achieved. Pp. 27–28.

431 F. 2d 138 affirmed as to those parts in which it affirmed the district court's judgment. The district court's order of August 7, 1970, is also affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

CERTIORARI

TO THE U.S. COURT OF APPEALS FOR THE 4TH CIRCUIT

APRIL 20, 1971

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of Federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action. *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

This case and those argued with it[1] arose in States having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what *Brown* v. *Board of Education* was all about. These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once. Meanwhile, district courts and courts of appeals have struggled in hundreds of cases with a multitude and variety of problems under this Court's general directive. Understandably, in an area of evolving remedies, those courts had to improvise and experiment without detailed or specific guidelines. This Court, in *Brown I*, appropriately dealt with the large constitutional principles; other Federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of "trial and error," and our effort to formulate guidelines must take into account their experience.

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[1] *McDaniel* v. *Barresi*, No. 420; *Davis* v. *Board of School Commissioners of Mobile County*, No. 436; *Moore* v. *Charlotte-Mecklenburg Board of Education*, No. 444; *North Carolina State Board of Education* v. *Swann*, No. 498. For purposes of this opinion the cross-petitions in Nos. 281 and 349 are treated as a single case and will be referred to as "this case."

I

The Charlotte-Mecklenburg school system, the 43d largest in the Nation, encompasses the city of Charlotte and surrounding Mecklenburg County, N.C. The area is large—550 square miles—spanning roughly 22 miles east-west and 36 miles north-south. During the 1968–69 school year the system served more than 84,000 pupils in 107 schools. Approximately 71 percent of the pupils were found to be white and 29 percent Negro. As of June 1969, there were approximately 24,000 Negro students in the system, of whom 21,000 attended schools within the city of Charlotte. Two-thirds of those 21,000—approximately 14,000 Negro students—attended 21 schools which were either totally Negro or more than 99 percent Negro.

This situation came about under a desegregation plan approved by the district court at the commencement of the present litigation in 1965, 243 F. Supp. 667 (WDNC), aff'd, 369 F. 2d 29 (CA4 1966), based upon geographic zoning with a free transfer provision. The present proceedings were initiated in September 1968 by Petitioner Swann's motion for further relief based on *Green* v. *County School Board*, 391 U.S. 430 (1968), and its companion cases.[2] All parties now agree that in 1969 the system fell short of achieving the unitary school system that those cases require.

The district court held numerous hearings and received voluminous evidence. In addition to finding certain actions of the school board to be discriminatory, the court also found that residential patterns in the city and county resulted in part from Federal, State, and local government action other than school board decisions. School board action based on these patterns, for example by locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods, resulted in segregated education. These findings were subsequently accepted by the court of appeals.

In April 1969 the district court ordered the school board to come forward with a plan for both faculty and student desegregation. Proposed plans were accepted by the court in June and August 1969 on an interim basis only, and the board was ordered to file a third plan by November 1969. In November the board moved for an extension of time until February 1970, but when that was denied the board submitted a partially completed plan. In December 1969 the district court held that the board's submission was unacceptable and appointed an expert in education administration, Dr. John Finger, to prepare a desegregation plan. Thereafter in February 1970, the district court was presented with two alternative pupil assignment plans—the finalized "board plan" and the "Finger plan."

THE BOARD PLAN

As finally submitted, the school board plan closed seven schools and reassigned their pupils. It restructured school attendance zones to achieve greater racial balance but maintained existing grade structures and rejected techniques such as pairing and clustering as part of a desegregation effort. The plan created a single athletic league, eliminated the previously racial basis of the schoolbus system, provided racially mixed faculties and administrative staffs, and modified its free transfer plan into an optional majority-to-minority transfer system.

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[2] *Raney* v. *Board of Education*, 391 U.S. 443 (1968), and *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968).

The board plan proposed substantial assignment of Negroes to nine of the system's 10 high schools, producing 17 to 36 percent Negro population in each. The projected Negro attendance at the 10th school, Independence, was 2 percent. The proposed attendance zones for the high schools were typically shaped like wedges of a pie, extending outward from the center of the city to the suburban and rural areas of the county in order to afford residents of the center city area access to outlying schools.

As for junior high schools, the board plan rezoned the 21 school areas so that in 20 the Negro attendance would range from 0 to 38 percent. The other school, located in the heart of the Negro residential area, was left with an enrollment of 90 percent Negro.

The board plan with respect to elementary schools relied entirely upon gerrymandering of geographic zones. More than half of the Negro elementary pupils were left in nine schools that were 86 to 100 percent Negro; approximately half of the white elementary pupils were assigned to schools 86 to 100 percent white.

THE FINGER PLAN

The plan submitted by the court-appointed expert, Dr. Finger, adopted the school board zoning plan for senior high schools with one modification: it required that an additional 300 Negro students be transported from the Negro residential area of the city to the nearly all-white Independence High School.

The Finger plan for the junior high schools employed much of the rezoning plan of the board, combined with the creation of nine "satellite" zones.[3] Under the satellite plan, inner-city Negro students were assigned by attendance zones to nine outlying predominately white junior high schools, thereby substantially desegregating every junior high school in the system.

The Finger plan departed from the board plan chiefly in its handling of the system's 76 elementary schools. Rather than relying solely upon geographic zoning, Dr. Finger proposed use of zoning, pairing, and grouping techniques, with the result that student bodies throughout the system would range from 9 to 38 percent Negro.[4]

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[3] A "satellite zone" is an area which is not contiguous with the main attendance zone surrounding the school.

[4] In its opinion and order of December 1, 1969, later incorporated in the order appointing Dr. Finger as consultant, the District Court stated:

"Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of such a plan from the school board, the court will start with the thought . . . that efforts should be made to reach a 71–29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable."

The district court described the plan thus:

> Like the board plan, the Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools with one black inner city school; by transporting black students from grades 1 through 4 to the outlying white schools; and by transporting white students from the 5th and 6th grades from the outlying white schools to the inner city black school.

Under the Finger plan, nine inner-city Negro schools were grouped in this manner with 24 suburban white schools.

On February 5, 1970, the district court adopted the board plan, as modified by Dr. Finger, for the junior and senior high schools. The court rejected the board elementary school plan and adopted the Finger plan as presented. Implementation was partially stayed by the Court of Appeals for the Fourth Circuit on March 5, and this court declined to disturb the Fourth Circuit's order, 397 U.S. 978 (1970).

On appeal the court of appeals affirmed the district court's order as to faculty desegregation and the secondary school plans, but vacated the order respecting elementary schools. While agreeing that the district court properly disapproved the board plan concerning these schools, the court of appeals feared that the pairing and grouping of elementary schools would place an unreasonable burden on the board and the system's pupils. The case was remanded to the district court for reconsideration and submission of further plans. This court granted certiorari, 399 U.S. 926, and directed reinstatement of the district court's order pending further proceedings in that court.

On remand the district court received two new plans for the elementary schools: a plan prepared by the U.S. Department of Health, Education, and Welfare (the HEW plan) based on contiguous grouping and zoning of schools, and a plan prepared by four members of the nine-member school board (the minority plan) achieving substantially the same results as the Finger plan but apparently with slightly less transportation. A majority of the school board declined to amend its proposal. After a lengthy evidentiary hearing the district court concluded that its own plan (the Finger plan), the minority plan, and an earlier draft of the Finger plan were all reasonable and acceptable. It directed the board to adopt one of the three or in the alternative to come forward with a new, equally effective plan of its own: the court ordered that the Finger plan would remain in effect in the event the school board declined to adopt a new plan. On August 7, the board indicated it would "acquiesce" in the Finger plan, reiterating its view that the plan was unreasonable. The district court, by order dated August 7, 1970, directed that the Finger plan remain in effect.

II

Nearly 17 years ago this Court held, in explicit terms, that State-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings. None of the parties before us challenges the Court's decision of May 17, 1954, that:

> . . . in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situatated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the 14th amendment. . . .
>
> Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. *Brown* v. *Board of Education, supra*, at 495.

None of the parties before us questions the Court's 1955 holding in *Brown II*, that:

> . . . [s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.
>
> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17,1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them. *Brown* v. *Board of Education*, 349 U.S. 294, 299–300 (1955).

Over the 15 years since *Brown II*, many difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race. Nothing in our national experience, prior to 1955, prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then. Deliberate resistance of some to the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this Court and other courts.

By the time the Court considered *Green* v. *County School Board*, 391 U.S. 430, in 1968, very little progress had been made in many areas where dual school systems had historically been maintained by operation of State laws. In *Green*, the Court was confronted with a record of a freedom-of-choice program that the district court had found to operate, in fact, to preserve a dual system more than a decade after *Brown II*. While acknowledging that a freedom-of-choice concept could be a valid remedial measure in some circumstances, its failure to be effective in *Green* required that:

> The burden on a school board today is to come forward with a plan that promises realistically to work . . . now . . . until it is clear that State-imposed segregation has been completely removed. *Green*, at 439.

This was plain language, yet the 1969 term of Court brought fresh evidence of the dilatory tactics of many school authorities. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, restated the basic obligation asserted in *Griffin* v. *School Board*, 377 U.S. 218, 234 (1964), and *Green*, supra, that the remedy must be implemented forthwith.

The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts.[5] The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the State-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954, in the structure and patterns of communities, the growth of student population,[6] movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented. Rural areas accustomed for half a century to the consolidated school systems implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns.

III

The objective today remains to eliminate from the public schools all vestiges of State-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S., at 437–438.

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[5] The necessity for this is suggested by the situation in the Fifth Circuit where 166 appeals in school desegregation cases were heard between December 2, 1969, and September 24, 1970.

[6] Elementary public school population (grades 1–6) grew from 17,447,000 in 1954 to 23,103,000 in 1969; secondary school population grew from 11,183,000 in 1954 to 20,775,000 in 1969. Digest of Educational Statistics, 1964 ed. 1, 6, Office of Education Publication #10024–64; Digest of Educational Statistics, 1970 ed. Table 28, Office of Education Publication #10024–70.

If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

> The essence of equity jurisdiction has been the power of the chancellor to do equity and to mould each degree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles*, 321 U.S. 329–330 (1944), cited in *Brown II*, *supra*, at 300.

This allocation of responsibility once made, the Court attempted from time to time to provide some guidelines for the exercise of the district judge's discretion and for the reviewing function of the courts of appeals. However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.

In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a Federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.

The school authorities argue that the equity powers of Federal district courts have been limited by title IV of the Civil Rights Act of 1964, 42 U.S.C., section 2000c. The language and the history of title IV shows that it was not enacted to limit but to define the role of the Federal Government in the implementation of the *Brown I* decision. It authorizes the Commissioner of Education to provide technical assistance to local boards in the preparation of desegregation plans, to arrange "training institutes" for school personnel involved in desegregation efforts, and to make grants directly to schools to ease the transition to unitary systems. It also authorizes the Attorney General, in specified circumstances, to initiate Federal desegregation suits. Section 2000c(b) defines "desegregation" as it is used in title IV:

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

Section 2000c–6, authorizing the Attorney General to institute Federal suits, contains the following proviso:

> . . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

On their face, the sections quoted purport only to insure that the provisions of title IV of the Civil Rights Act of 1964 will not be read as granting new powers. The proviso in section 2000c–6 in terms designed to foreclose any interpretation of the act as expanding the existing powers of Federal courts to enforce the equal protection clause. There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers. The legislative history of title IV indicates that Congress was concerned that the act might be read as creating a right of action under the 14th amendment in the situation of so-called de facto segregation, where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of State authorities. In short, there is nothing in the act which provides us material assistance in answering the question of remedy for State-imposed segregation in violation of *Brown I*. The basis of our decision must be the prohibition of the 14th amendment that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

IV

We turn now to the problem of defining with more particularity the responsibilities of school authorities in desegregating a State-enforced dual school system in light of the equal protection clause. Although the several related cases before us are primarily concerned with problems of student assignment, it may be helpful to begin with a brief discussion of other aspects of the process.

In *Green*, we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia [illegible]gated system. 391 U.S., at 435. Independent of student ass[illegible] it is possible to identify a "white school" or a "Negr[illegible] by reference to the racial composition of teachers a[illegible]lity of school buildings and equipment, or the organiz[illegible]ivities, a prima facie case of violation of substantive constitutional rights under the equal protection clause is shown.

When a system has been dual in these respects, the first remedial responsibility of school authorities is to eliminate invidious racial distinctions. With respect to such matters as transportation, supporting personnel, and extracurricular activities, no more than this may be necessary. Similar corrective action must be taken wth regard to the maintenance of buildings and the distribution of equipment. In these areas, normal administrative practice should produce schools of like quality, facilities, and staffs. Something more must be said, however, as to faculty assignment and new school construction.

In the companion *Davis* case, the Mobile school board has argued that the Constitution requires that teachers be assigned on a "color blind" basis. It also argues that the Constitution prohibits district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. We reject that contention.

In *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969), the district court set as a goal a plan of faculty assignment in each school with a ratio of white to Negro faculty members substantially the same throughout the system. This order was predicated on the district court finding that:

> The evidence does not reflect any real administrative problems involved in immediately desegregating the substitute teachers, the student teachers, the night school faculties, and in the evolvement of a really legally adequate program for the substantial desegregation of the faculties of all schools in the system commencing with the school year 1968–69. Quoted at 395 U.S., at 232.

The district court in *Montgomery* then proceeded to set an initial ratio for the whole system of at least two Negro teachers out of each 12 in any given school. The court of appeals modified the order by eliminating what it regarded as "fixed mathematical ratios" of faculty and substituted an initial requirement of "substantially or approximately" a 5-to-1 ratio. With respect to the future, the court of appeals held that the numerical ratio should be eliminated and that compliance should not be tested solely by the achievement of specified proportions. Id., at 234.

We reversed the court of appeals and restored the district court's order in its entirety, holding that the order of the district judge

> was adopted in the spirit of this court's opinion in *Green* . . . in that this plan "promises realistically to work, and promises realistically to work now." The modifications ordered by the panel of the court of appeals, while of course not intended to do so, would, we think, take from the order some of its capacity to expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope. . . . We also believe that under all the circumstances of this case we follow the original plan outlined in *Brown II* . . . by accepting the more specific and expeditious order of [district] Judge Johnson. . . . 395 U.S., at 235–236 (emphasis original).

The principles of *Montgomery* have been properly followed by the district court and the court of appeals in this case.

The construction of new schools and the closing of old ones is one of the most important functions of local school authorities and also one of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.

In the past, choices in this respect have been used as a potent weapon for creating or maintaining a State-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. In devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment is not used and does not serve to perpetuate or reestablish the dual system. When necessary, district courts should retain jurisdiction to assure that these responsibilities are carried out. See *United States* v. *Board of Public Instruction*, 395 F. 2d 66 (CA5 1968); *Brewer* v. *School Board*, 397 F. 2d 37 (CA4 1968).

V

The central issue in this case is that of student assignment, and there are essentially four problem areas:

1. To what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;

2. Whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;

3. What are the limits, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and

4. What are the limits, if any, on the use of transportation facilities to correct State-enforced racial school segregation.

RACIAL BALANCES OR RACIAL QUOTAS

The constant theme and thrust of every holding from *Brown I* to date is that State-enforced separation of races in public schools is discrimination that violates the equal protection clause. The remedy commanded was to dismantle dual school systems.

We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination. We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it.

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, dirctly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

In this case it is urged that the district court has imposed a racial balance requirement of 71-to-29 percent on individual schools. The fact that no such objective was actually achieved—and would appear to be impossible—tends to blunt that claim, yet in the opinion and order of the district court of December 1, 1969, we find that court directing:

> . . . that efforts should be made to reach a 71-to-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others . . . , that no school [should] be operated with an all-black or predominantly-black student body, [and] that pupils of all grades [should] be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students.

The district judge went on to acknowledge that variation "from that norm may be unavoidable." This contains intimations that the "norm" is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the district court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

As the voluminous record in this case shows,[7] the predicate for the district court's use of the 71- to 29-percent ratio was twofold: First, its express finding, approved by the court of appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the court of appeals, that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the district judge who, on at least three occasions, urged the board to submit plans.[8] As the statement of facts shows, these findings are abundantly supported by the record. It was because of this total failure of the school board that the district court was obliged to turn to other qualified sources, and Dr. Finger was designated to assist the district court to do what the board should have done.

We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the district court proceeded to frame a decree that was within its discretionary powers, an equitable remedy for the particular circumstances.[9] As we said in *Green*, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the district court.

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[7] It must be remembered that the District Court entered nearly a score of orders, numerous sets of findings and for the most part each was accompanied by a memorandum opinion. Considering the pressure under which the court was obliged to operate we would not expect that all inconsistencies and apparent inconsistencies could be avoided. Our review, of course, is on the orders of February 5, 1970, as amended, and August 7, 1970.

[8] The final board plan left 10 schools 86% to 100% Negro and yet categorically rejected the techniques of pairing and clustering as part of the desegregation effort. As discussed below, the Charlotte board was under an obligation to exercise every reasonable effort to remedy the violation, once it was identified, and the suggested techniques are permissible remedial devices. Additionally, as noted by the District Court and Court of Appeals, the board plan refused to assign white students to any school unless the student population of that school was at least 60% white. This was an arbitrary limitation negating reasonable remedial steps.

[9] In his August 3, 1970, memorandum holding that the District Court plan was "reasonable" under the standard laid down by the Fourth Circuit on appeal, the District Court explained the approach taken as follows:

"This court has not ruled, and does not rule that 'racial balance' is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before this court.*" (Emphasis in original.)

ONE-RACE SCHOOLS

The record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominantly of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of State-enforced segregation.

In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the State-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move. Cf. *Ellis* v. *Board of Public Instruction*, 453 F. 2d 203, 206 (CA5 1970). The court orders in this and the companion *Davis* case now provide such an option.

REMEDIAL ALTERING OF ATTENDANCE ZONES

The maps submitted in these cases graphically demonstrate that one of the principal tools employed by school planners and by courts to break up the dual school system has been a frank—and sometimes drastic—gerrymandering of school districts and attendance zones. An additional step was pairing, "clustering," or "grouping" of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools. More often than not, these zones are neither compact [10] nor contiguous; indeed they may be on opposite ends of the city. As an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a court.

Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

In this area, we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals.

We hold that the pairing and grouping of noncontiguous school zones is a permissible tool and such action is to be considered in light of the objectives sought. Judicial steps in shaping such zones going beyond combinations of contiguous areas should be examined in light of what is said in subdivisions (1), (2), and (3) of this opinion concerning the objectives to be sought. Maps do not tell the whole story since noncontiguous school zones may be more accessible to each other in terms of the critical travel time, because of traffic patterns and good highways, than schools geographically closer together. Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations.

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[10] The relance of school authorities on the reference to the "revision of . . . attendance areas into *compact units*," *Brown II*, at 300, is misplaced. The enumeration in that opinion of considerations to be taken into account by district courts was patently intended to be suggestive rather than exhaustive. The decision in *Brown II* to remand the cases decided in *Brown I* to local courts for the framing of specific decrees was premised on a recognition that this Court could not at that time foresee the particular means which would be required to implement the constitutional principles announced. We said in *Green, supra*, at 439:

"The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance."

TRANSPORTATION OF STUDENTS

The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the Nation's public school children, approximately 39 percent, were transported to their schools by bus in 1969–70 in all parts of the country.

The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case.[11] The Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. The district court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

Thus the remedial techniques used in the district court's order were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority.

The decree provided that the buses used to implement the plan would operate on direct routes. Students would be picked up at schools near their homes and transported to the schools they were to attend. The trips for elementary school pupils average about 7 miles and the district court found that they would take "not over 35 minutes at the most." [12] This system compares favorably with the transportation plan previously operated in Charlotte under which each day 23,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour. In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.

An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan in light of what is said in subdivisions (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed.

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[11] During 1967–68, for example, the Mobile board used 207 buses to transport 22,094 students daily for an average round trip of 31 miles. During 1966–67, 7,116 students in the metropolitan area were bussed daily. In Charlotte-Mecklenburg, the system as a whole, without regard to desegregation plans, planned to bus approximately 23,000 students this year, for an average daily round trip of 15 miles. More elementary school children than high school children were to be bussed, and 4- and 5-year-olds travel the longest routes in the system.

[12] The District Court found that the school system would have to employ 138 more buses than it had previously operated. But 105 of those buses were already available and the others could easily be obtained. Additionally, it should be noted that North Carolina requires provision of transportation for all students who are assigned to schools more than one and one-half miles from their homes. N.C. Stat. sec. 115–186(b).

VI

The court of appeals, searching for a term to define the equitable remedial power of the district courts, used the term "reasonableness." In *Green, supra*, this court used the term "feasible" and by implication, "workable," "effective," and "realistic" in the mandate to develop "a plan that promises realistically to work, and . . . to work *now*." On the facts of this case, we are unable to conclude that the order of the district court is not reasonable, feasible and workable. However, in seeking to define the scope of remedial power or the limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity.

At some point, these school authorities and others like them should have achieved full compliance with this court's decision in *Brown I*. The systems will then be "unitary" in the sense required by our decisions in *Green* and *Alexander*.

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that Federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

For the reasons herein set forth, the judgment of the court of appeals is affirmed as to those parts in which it affirmed the judgment of the district court. The order of the district court dated August 7, 1970, is also affirmed.

It is so ordered.

Part II

SCHOOL DESEGREGATION CASES WITH METROPOLITAN IMPLICATIONS

BRADLEY *v.* MILLIKEN

Civ. Action 35257 (E.D. Mich. 1971)

RULING ON ISSUE OF SEGREGATION

This action was commenced August 18, 1970, by plaintiffs, the Detroit branch of the National Association for the Advancement of Colored People* and individual parents and students, on behalf of a class later defined by order of the court dated February 16, 1971, to include "all school children of the city of Detroit and all Detroit resident parents who have children of school age." Defendants are the board of education of the city of Detroit, its members, and its former superintendent of schools, Dr. Norman A. Drachler, the Governor, attorney general, State board of education and State superintendent of public instruction of the State of Michigan. In their complaint, plaintiffs attacked a statute of the State of Michigan known as act 48 of the 1970 legislature on the ground that it put the State of Michigan in the position of unconstitutionally interfering with the execution and operation of a voluntary plan of partial high school desegregation (known as the Apr. 7, 1970 plan) which had been adopted by the Detroit board of education to be effective beginning with the fall 1970 semester. Plaintiffs also alleged that the Detroit public school system was and is segregated on the basis of race as a result of the official policies and actions of the defendants and their predecessors in office.

Additional parties have intervened in the litigation since it was commenced. The Detroit Federation of Teachers (DFT) which represents a majority of Detroit public school teachers in collective bargaining negotiations with the defendant board of education, has intervened as a defendant, and a group of parents has intervened as defendants.

Initially the matter was tried on plaintiff's motion for preliminary injunction to restrain the enforcement of act 48 so as to permit the April 7 plan to be implemented. On that issue, this court ruled that plaintiffs were not entitled to a preliminary injunction since there had been no proof that Detroit has a segregated school system. The court of appeals found that the "implementation of the April 7 plan was thwarted by State action in the form of the act of the Legislature of

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*The standing of the NAACP as a proper party plaintiff was not contested by the original defendants and the court expresses no opinion on the matter.

Michigan," (433 F. 2d 897, 902), and that such action could not be interposed to delay, obstruct, or nullify steps lawfully taken for the purpose of protecting rights guaranteed by the 14th amendment.

The plaintiffs then sought to have this court direct the defendant Detroit board to implement the April 7 plan by the start of the second semester (February 1971) in order to remedy the deprivation of constitutional rights wrought by the unconstitutional statute. In response to an order of the court, defendant board suggested two other plans, along with the April 7 plan, and noted priorities, with top priority assigned to the so-called magnet plan. The court acceded to the wishes of the board and approved the magnet plan. Again, plaintiffs appealed but the appellate court refused to pass on the merits of the plan. Instead, the case was remanded with instructions to proceed immediately to a trial on the merits of plaintiffs' substantive allegations about the Detroit school system. 438 F. 2d 945 (6th Cir. 1971).

Trial, limited to the issue of segregation, began April 6, 1971, and concluded on July 22, 1971, consuming 41 trial days, interspersed by several brief recesses necessitated by other demands upon the time of court and counsel. Plaintiffs introduced substantial evidence in support of their contentions, including expert and factual testimony, demonstrative exhibits, and school board documents. At the close of plaintiffs' case, in chief, the court ruled that they had presented a prima facie case of State-imposed segregation in the Detroit public schools: accordingly, the court enjoined—with certain exceptions—all further school construction in Detroit pending the outcome of the litigation.

The State defendants urged motions to dismiss as to them. These were denied by the court.

At the close of proofs intervening parent defendants—Denise Magdowski et al.—filed a motion to join, as parties, 85 contiguous "suburban" school districts—all within the so-called larger Detroit metropolitan area. This motion was taken under advisement pending the determination of the issue of segregation.

It should be noted that, in accordance with earlier rulings of the court, proofs submitted at previous hearings in the cause, were to be and are considered as part of the proofs of the hearings on the merits.

In considering the present racial complexion of the city of Detroit and its public school system we must first look to the past and view in perspective what has happened in the last half century. In 1920, Detroit was a predominantly white city—91 percent—and its population younger than in more recent times. By the year 1960, the largest segment of the city's white population was in the age range of 35 to 50 years, while its black population was younger and of childbearing age. The population of 0–15 years of age constituted 30 percent of the total population of which 60 percent were white and 40 percent were black. In 1970, the white population was principally aging—45 years—while the black population was younger and of childbearing age. Childbearing blacks equaled or exceeded the total white population. As older white families without children of school age leave the city they are replaced by younger black families with school-age children, resulting in a doubling of enrollment in the local neighborhood school and a complete change in student population from white to black. As black inner city residents move out of the core city they "leapfrog" the residential areas nearest their former homes and move to areas recently occupied by whites.

The population of the city of Detroit reached its highest point in 1950, and has been declining by approximately 169,500 per decade since then. In 1950, the city population constituted 61 percent of the total population of the standard metropolitan area and in 1970, it was but 36 percent of the metropolitan area population. The suburban population has increased by 1,978,000 since 1940. There has been a steady outmigration of the Detroit population since 1940. Detroit today is principally a conglomerate of poor black and white plus the aged. Of the aged, 80 percent are white.

If the population trends evidenced in the Federal decennial census for the years 1940 through 1970 continue, the total black population in the city of Detroit in 1980 will be approximately 840,000, or 53 percent of the total. The total population of the city in 1970 is 1,511,000 and, if past trends continue, will be 1,338,000 in 1980. In school year 1960–61, there were 285,512 students in the Detroit public schools of which 130,765 were black. In school year 1966–67, there were 297,035 students, of which 168,299 were black. In school year 1970–71, there were 289,743 students of which 184,194 were black. The percentage of black students in the Detroit public schools in 1975–76 will be 72.0 percent, in 1980–81 will be 80.7 percent, and in 1992 it will be virtually 100 percent if the present trends continue. In 1960, the nonwhite population, ages 0 years to 19 years, was as follows:

	Percent		*Percent*
0–4 years	42	10–14 years	28
5–9 years	36	15–19 years	18

In 1970, the nonwhite population, ages 0 years to 19 years, was as follows:

	Percent		*Percent*
0–4 years	48	10–14 years	50
5–9 years	50	15–19 years	40

The Black population as a percentage of the total population in the city of Detroit was:

	Percent		*Percent*
a. 1900	1. 4	e. 1940	9. 2
b. 1910	1. 2	f. 1950	16. 2
c. 1920	4. 1	g. 1960	28. 9
d. 1930	7. 7	h. 1970	43. 9

The black population as a percentage of total student population of the Detroit public schools was as follows:

	Percent		
a. 1961	45. 8	f. 1967	58. 2
b. 1963	51. 3	g. 1968	59. 4
c. 1964	53. 0	h. 1969	61. 5
d. 1965	54. 8	i. 1970	63. 8
e. 1966	56. 7		

For the years indicated, the housing characteristics in the city of Detroit were as follows:

a. 1960—Total supply of housing units was 553,000.
b. 1970—Total supply of housing units was 530,770.

The percentage decline in the white students in the Detroit public schools during the period 1961–79 (53.6 percent in 1960; 34.8 percent in 1970) has been greater than the percentage decline in the white population in the city of Detroit during the same period (70.8 percent in 1960; 55.21 percent in 1970), and correlatively, the percentage increase in black students in the Detroit public schools during the 9-year period 1961–70 (45.8 percent in 1961; 63.8 percent in 1970) has been greater than the percentage increase in the black population of the city of Detroit during the 10-year period 1960–70 (28.9 percent in 1960; 43.9 percent in 1970). In 1961 there were eight schools in the system without white pupils and 73 schools with no Negro pupils. In 1970 there were 30 schools with no white pupils and 11 schools with no Negro pupils, an increase in the number of schools without white pupils of 22 and a decrease in the number of schools without Negro pupils of 62 in this 10-year period. Between 1968 and 1970, Detroit experienced the largest increase in percentage of black students in the student population of any major northern school district. The percentage increase in Detroit was 4.7 percent as contrasted with—

	Percent		*Percent*
New York	2.0	Columbus	1.4
Los Angeles	1.5	Indianapolis	2.6
Chicago	1.9	Denver	1.1
Philadelphia	1.7	Boston	3.2
Cleveland	1.7	San Francisco	1.5
Milwaukee	2.6	Seattle	2.4
St. Louis	2.6		

In 1960, there were 266 schools in the Detroit school system. In 1970, there were 319 schools in the Detroit school system.

In the Western, Northwestern, Northern, Murray, Northeastern, Kettering, King, and Southeastern high school service areas, the following conditions exist at a level significantly higher than the city average:

a. Poverty in children;
b. Family income below poverty level;
c. Rate of homicides per population;
d. Number of households headed by females;
e. Infant mortality rate;
f. Surviving infants with neurological defects;
g. Tuberculosis cases per 1,000 population; and
h. High pupil turnover in schools.

The city of Detroit is a community generally divided by racial lines. Residential segregation within the city and throughout the larger metropolitan area is substantial, pervasive and of long standing. Black citizens are located in separate and distinct areas within the city and are not generally to be found in the suburbs. While the racially unrestricted choice of black persons and economic factors may have played some part in the development of this pattern of residential segregation, it is, in the main, the result of past and present practices and customs of racial discrimination, both public and private, which have and do restrict the housing opportunities of black people. On the record there can be no other finding.

Governmental actions and inaction at all levels, Federal, State and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area. It is no answer to say that restricted practices grew gradually (as the black population in the area increased between 1920 and 1970), or that since 1948 racial restrictions on the ownership of real property have been removed. The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community—as we know, the choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of "harmonious" neighborhoods, that is, racially and economically harmonious. The conditions created continue. While it would be unfair to charge the present defendants with what other governmental officers or agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and State, were linked to that of these other governmental units.

When we speak of governmental action we should not view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, including the school authorities, are, in part, responsible for the segregated condition which exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of the schools.

Turning now to the specific and pertinent (for our purposes) history of the Detroit school system so far as it involves both the local school authorities and the State school authorities, we find the following:

During the decade beginning in 1950 the board created and maintained optional attendance zones in neighborhoods undergoing racial transition and between high school attendance areas of opposite predominant racial compositions. In 1959 there were eight basic optional attendance areas affecting 21 schools. Optional attendance areas provided pupils living within certain elementary areas a choice of attendance at one of two high schools. In addition there was at least one optional area either created or existing in 1960 between two junior high schools of opposite predominant racial components. All of the high school optional areas, except two, were in neighborhoods undergoing racial transition (from white to black) during the 1950's. The two exceptions were:

1. The option between Southwestern (61.6 percent black in 1960) and Western (15.3 percent black);
2. The option between Denby (0.0 percent black) and Southeastern (30.9 percent black).

With the exception of the Denby-Southeastern option (just noted) all of the options were between high schools of opposite predominant racial compositions. The Southwestern-Western and Denby-Southeastern optional areas are all white on the 1950, 1960 and 1970 census maps. Both Southwestern and Southeastern, however, had substantial white pupil populations, and the option allowed whites to escape integration. The natural, probable, forseeable and actual effect of these optional zones was to allow white youngsters to escape identifiably "black" schools. There had also been an optional zone (eliminated between 1956 and 1959) created in "an attempt . . . to separate Jews and Gentiles within the system," the effect of which was that Jewish youngsters went to Mumford High School and Gentile youngsters went to Cooley. Although many of these optional areas had served their purpose by 1960 due to the fact that most of the areas had become predominantly black, one optional area (Southwestern-Western affecting

Wilson Junior High graduates) continued until the present school year (and will continue to effect 11th and 12th grade white youngsters who elected to escape from predominantly black Southwestern to predominantly white Western High School). Mr. Henrickson, the board's general fact witness, who was employed in 1959 to, inter alia, eliminate optional areas, noted in 1967 that: "In operation Western appears to be still the school to which white students escape from predominantly Negro surrounding schools." The effect of eliminating this optional area (which affected only 10th graders for the 1970–71 school year) was to decrease Southwestern from 86.7 percent black in 1969 to 74.3 percent black in 1970.

The board, in the operation of its transportation to relieve overcrowding policy, has admittedly bused black pupils past or away from closer white schools with available space to black schools. This practice has continued in several instances in recent years despite the board's avowed policy, adopted in 1967, to utilize transportation to increase integration.

With one exception (necessitated by the burning of a white school), defendant board has never bused white children to predominantly black schools. The board has not bused white pupils to black schools despite the enormous amount of space available in inner-city schools. There were 2,961 vacant seats in schools 90 percent or more black.

The board has created and altered attendance zones, maintained and altered grade structures and created and altered feeder school patterns in a manner which has had the natural, probable and actual effect of continuing black and white pupils in racially segregated schools. The board admits at least one instance where it purposefully and intentionally built and maintained a school and its attendance zone to contain black students. Throughout the last decade (and presently) school attendance zones of opposite racial compositions have been separated by north-south boundary lines, despite the board's awareness (since at least 1962) that drawing boundary lines in an east-west direction would result in significant integration. The natural and actual effect of these acts and failures to act has been the creation and perpetuation of school segregation. There has never been a feeder pattern or zoning change which placed a predominantly white residential area into a predominantly black school zone or feeder pattern. Every school which was 90 percent or more black in 1960, and which is still in use today, remains 90 percent or more black. Whereas 65.8 percent of Detroit's black students attended 90 percent or more black schools in 1960, 74.9 percent of the black students attended 90 percent or more black schools during the 1970–71 school year.

The public schools operated by defendant board are thus segregated on a racial basis. This racial segregation is in part the result of the discriminatory acts and omissions of defendant board.

In 1966, the defendant State board of education and Michigan Civil Rights Commission issued a joint policy statement on equality of educational opportunity, requiring that:

> Local school boards must consider the factor of racial balance along with other educational considerations in making decisions about selection of new school sites, expansion of present facilities * * *. Each of these situations presents an opportunity for integration.

Defendant State board's School Plant Planning Handbook requires that:

> Care in site location must be taken if a serious transportation problem exists or if housing patterns in an area would result in a school largely segregated on racial, ethnic, or socioeconomic lines.

The defendant city board has paid little heed to these statements and guidelines. The State defendants have similarly failed to take any action to effectuate these policies. Exhibit NN reflects construction (new or additional) at 14 schools which opened for use in 1970–71; of these 14 schools, 11 opened over 90 percent black and one opened less than 10 percent black. School construction costing $9,222,000 is opening at Northwestern High School which is 99.9 percent black, and new construction opens at Brooks Junior High, which is 1.5 percent black, at a cost of $2,500,000. The construction at Brooks Junior High plays a dual segregatory role: not only is the construction segregated, it will result in a feeder pattern change which will remove the last majority white school from the already almost all black Mackenzie High School attendance area.

Since 1959, the board has constructed at least 13 small primary schools with capacities of from 300 to 400 pupils. This practice negates opportunities to integrate, "contains" the black population and perpetuates and compounds school segregation.

The State and its agencies, in addition to their general responsibility for and supervision of public education, have acted directly to control and maintain the pattern of segregation in the Detroit schools. The State refused until this session of the legislature, to provide authorization or funds for the transportation of pupils within Detroit regardless of their poverty or distance from the school to which they were assigned, while providing in many neighboring, mostly white, suburban districts the full range of State-supported transportation. This and other financial limitations, such as those on bonding and the working of the State aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax effort, have created and perpetuated systematic educational inequalities.

The State, exercising what Michigan courts have held to be is "plenary power" which includes power "to use a stautory scheme, to create, alter, reorganize, or even dissolve a school district, despite any desire of the school district, its board, or the inhabitants thereof," acted to reorganize the school district of the city of Detroit.

The State acted through act 48 to impede, delay, and minimize racial integration in Detroit schools. The first sentence of section 12 of the act was directly related to the April 7, 1970, desegregation plan. The remainder of the section sought to prescribe for each school in the eight districts criterion of "free choice" (open enrollment) and "neighborhood schools" ("nearest school priority acceptance"), which had as their purpose and effect the maintenance of segregation.

In view of our findings of fact already noted we think it unnecessary to parse in detail the activities of the local board and the State authorities in the area of school construction and the furnishing of school facilities. It is our conclusion that these activities were in keeping generally with the discriminatory practices which advanced or perpetuated racial segregation in these schools.

It would be unfair for us not to recognize the many fine steps the board has taken to advance the cause of quality education for all in terms of racial integration and human relations. The most obvious of these is in the field of faculty integration.

Plaintiffs urge the court to consider allegedly discriminatory practices of the board with respect to the hiring, assignment, and transfer of teachers and school administrators during a period reaching back more than 15 years. The short answer to that must be that black teachers and school administrative personnel were not readily available in that period. The board and the intervening defendant union have followed a most advanced and exemplary course in adopting and carrying out what is called the balanced staff concept—which seeks to balance faculties in each school with respect to race, sex, and experience, with primary emphasis on race. More particularly, we find:

1. With the exception of affirmative policies designed to achieve racial balance in instructional staff, no teacher in the Detroit Public Schools is hired, promoted, or assigned to any school by reason of his race.
2. In 1956, the Detroit Board of Education adopted the rules and regulations of the Fair Employment Practices Act as its hiring and promotion policy and has adhered to this policy to date.
3. The board has actively and affirmatively sought out and hired minority employees, particularly teachers and administrators, during the past decade.
4. Between 1960 and 1970, the Detroit Board of Education has increased black representation among its teachers from 23.3 percent to 42.1 percent, and among its administrators from 4.5 percent to 37.8 percent.
5. Detroit has a higher proportion of black administrators than any other city in the country.
6. Detroit ranked second to Cleveland in 1968, among the 20 largest Northern city school districts in the percentage of blacks among the teaching faculty and in 1970 surpassed Cleveland by several percentage points.
7. The Detroit Board of Education currently employs black teachers in a greater percentage than the percentage of adult black persons in the city of Detroit.
8. Since 1967, more blacks than whites have been placed in high administrative posts with the Detroit Board of Education.
9. The allegation that the board assigns black teachers to black schools is not supported by the record.
10. Teacher transfers are not granted in the Detroit Public Schools unless they conform with the balanced staff concept.
11. Between 1960 and 1970, the Detroit Board of Education reduced the percentage of schools without black faculty from 36.1 percent to 1.2 percent, and of the four schools currently without black faculty, three are specialized trade schools where minority faculty cannot easily be secured.
12. In 1968, of the 20 largest Northern city school districts, Detroit ranked fourth in the percentage of schools having one or more black teachers and third in the percentage of schools having three or more black teachers.

13. In 1970, the board held open 240 positions in schools with less than 25 percent black, rejecting white applicants for these positions until qualified black applicants could be found and assigned.

14. In recent years, the board has come under pressure from large segments of the black community to assign male black administrators to predominantly black schools to serve as male role models for students, but such assignments have been made only where consistent with the balanced staff concept.

15. The numbers and percentages of black teachers in Detroit increased from 2,275 and 21.6 percent respectively, in February 1961, to 5,106 and 41.6 percent, respectively, in October 1970.

16. The number of schools by percent black of staffs changed from October 1963 to October 1970, as follows:

Number of schools without black teachers—decreased from 41 to 4.

Number of schools with more than 0 percent, but less than 10 percent black teachers—decreased from 58 to 8.

Total number of schools with less than 10 percent black teachers—decreased from 99 to 12.

Number of schools with 50 percent or more black teachers—increased from 72 to 124.

17. The number of schools by percent black of staffs changed from October 1969 to October 1970, as follows:

Number of schools without black teachers—decreased from 6 to 4.

Number of schools with more than 0 percent, but less than 10 percent black teachers—decreased from 41 to 8.

Total number of schools with less than 10 percent black teachers—decreased from 47 to 12.

Number of schools with 50 percent or more black teachers—increased from 120 to 124.

18. The total number of transfers necessary to achieve a faculty racial quota in each school corresponding to the systemwide ratio, and ignoring all other elements, is, as of 1970, 1,826.

19. If account is taken of other elements necessary to assure quality integrated education, including qualifications to teach the subject area and grade level, balance of experience, and balance of sex, and further account is taken of the uneven distribution of black teachers by subject taught and sex, the total number of transfers which would; be necessary to achieve a faculty racial quota in each school corresponding to the systemwide ratio, if attainable at all, would be infinitely greater.

20. Balancing of staff by qualifications for subject and grade level, then by race, experience, and sex, is educationally desirable and important.

21. It is important for students to have a successful role model, especially black students in certain schools, and at certain grade levels.

22. A quota of racial balance for faculty in each school which is equivalent to the systemwide ratio and without more is educationally undesirable and arbitrary.

23. A severe teacher shortage in the 1950's and 1960's impeded integration-of-faculty opportunities.

24. Disadvantageous teaching conditions in Detroit in the 1960's—salaries, pupil mobility and transiency, class size, building conditions, distance from teacher residence, shortage of teacher substitutes, et cetera—made teacher recruitment and placement difficult.

25. The board did not segregate faculty by race, but rather attempted to fill vacancies with certified and qualified teachers who would take offered assignments.

26. Teacher seniority in the Detroit system, although measured by systemwide service, has been applied consistently to protect against involuntary transfers and "bumping" in given schools.

27. Involuntary transfers of teachers have occurred only because of unsatisfactory ratings or because of decrease of teacher services in a school, and then only in accordance with balanced staff concept.

28. There is no evidence in the record that Detroit teacher seniority rights had other than equitable purpose or effect.

29. Substantial racial integration of staff can be achieved, without disruption of seniority and stable teaching relationships, by application of the balanced staff concept to naturally occurring vacancies and increases and reductions of teacher services.

30. The Detroit Board of Education has entered into successive collective bargaining contracts with the Detroit Federation of Teachers, which contracts have included provisions promoting integration of staff and students.

The Detroit School Board has, in many other instances and in many respects, undertaken to lessen the impact of the forces of segregation and attempted to advance the cause of integration. Perhaps the most obvious one was the adoption of the April 7 plan. Among other things, it has denied the use of its facilities to groups which practice racial discrimination; it does not permit the use of its facilities for discriminatory apprentice training programs; it has opposed State legislation which would have the effect of segregating the district; it has worked to place black students in craft positions in industry and the building trades; it has brought about a substantial increase in the percentage of black students in manufacturing and construction trade apprenticeship classes; it became the first public agency in Michigan to adopt and implement a policy requiring affirmative act of contractors with which it deals to insure equal employment opportunities in their work forces; it has been a leader in pioneering the use of multiethnic instructional material, and in so doing has had an impact on publishers specializing in producing school texts and instructional materials; and it has taken other noteworthy pioneering steps to advance relations between the white and black races.

In conclusion, however, we find that both the State of Michigan and the Detroit Board of Education have committed acts which have been causal factors in the segregated condition of the public schools of the city of Detroit. As we assay the principles essential to a finding of de jure segregation, as outlined in rulings of the U.S. Supreme Court, they are:

> 1. The State, through its officers and agencies, and usually, the school administration, must have taken some action or actions with a purpose of segregation.

2. This action or these actions must have created or aggravated segregation in the schools in question.

3. A current condition of segregation exists.

We find these tests to have been met in this case. We recognize that causation in the case before us is both several and comparative. The principal causes undeniably have been population movement and housing patterns, but State and local governmental actions, including school board actions, have played a substantial role in promoting segregation. It is, the Court believes, unfortunate that we cannot deal with public school segregation on a no-fault basis, for if racial segregation in our public schools is an evil, then it should make no difference whether we classify it de jure or de facto. Our objective, logically, it seems to us, should be to remedy a condition which we believe needs correction. In the most realistic sense, if fault or blame must be found it is that of the community as a whole, including, of course, the black components. We need not minimize the effect of the actions of Federal, State, and local governmental officers and agencies, and the actions of loaning institutions and real estate firms, in the establishment and maintenance of segregated residential patterns—which lead to school segregation—to observe that blacks, like ethnic groups in the past, have tended to separate from the larger group and associate together. The ghetto is at once both a place of confinement and a refuge. There is enough blame for everyone to share.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of ths action under 28 U.S.C. 1331(a), 1343 (3) and (4), 2201 and 2202; 42 U.S.C. 1983, 1988, and 2000d.

2. In considering the evidence and in applying legal standards it is not necessary that the Court find that the policies and practices, which it has found to be discriminatory, have as their motivating forces any evil intent or motive. *Keyes* v. *School District No. 1, Denver*, 383 F. Supp. 279. Motive, ill will and bad faith have long ago been rejected as a requirement to involke the protection of the 14th amendment against racial discrimination. *Sims* v. *Georgia*, 389 U.S. 404, 407–8.

3. School districts are accountable for the natural, probable and foreseeable consequences of their policies and practices, and where racially identifiable schools are the result of such policies, the school authorities bear the burden of showing that such policies are based on educationally required, nonracial considerations. *Keyes* v. *School District, supra*, and *Davis* v. *School District of Pontiac*, 309 F. Supp. 734, and 443 F. 2d 573.

4. In determining whether a constitutional violation has occured, proof that a pattern of racially segregated schools has existed for a considerable period of time amounts to a showing of racial classification by the State and its agencies, which must be justified by clear and convincing evidence. *State of Alabama* v. *United States*, 304 F. 2d 583.

5. The board's practice of shaping school attendance zones on a north-south rather than an east-west orientation, with the result that zone boundaries conformed to racial residential dividing

lines, violated the 14th amendment. *Northcross* v. *Board of Education, Memphis*, 333 F. 2d 661.

6. Pupil racial segregation in the Detroit Public School System and the residential racial segregation resulting primarily from public and private racial discrimination are interdependent phenomena. The affirmative obligation of the defendant board has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential racial segregation. The board's building upon housing segregation violates the 14th amendment. See *Davis* v. *School District of Pontiac*, *supra*, and authorities there noted.

7. The board's policy of selective optional attendance zones, to the extent that it facilitated the separation of pupils on the basis of race, was in violation of the 14th amendment. *Hobson* v. *Hansen*, 269 F. Supp. 401, *aff'd sub nom.*, *Smuck* v. *Hobson*, 408 F. 2d 175.

8. The practice of the board of transporting black students from overcrowded black schools to other identifiably black schools, while passing closer identifiably white schools, which could have accepted these pupils, amounted to an act of segregation by the school authorities. *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501.

9. The manner in which the Board formulated and modified attendance zones for elementary schools had the natural and predictable effect of perpetuating racial segregation of students. Such conduct is an act of de jure discrimination in violation of the 14th amendment. *U.S.* v. *School District 151*, 286 F. Supp. 786; *Brewer* v. *City of Norfolk*, 397 F. 2d 37.

10. A school board may not, consistent with the 14th amendment, maintain segregated elementary schools or permit educational choices to be influenced by community sentiment or the wishes of a majority of voters. *Cooper* v. *Aaron*, 358 U.S. 1, 12–13, 15–16.

> A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be. (*Lucas* v. *44th General Assembly of Colorado*, 377 U.S. 713, 736–737.)

11. Under the Constitution of the United States and the constitution and laws of the State of Michigan, the responsibility for providing educational opportunity to all children on constitutional terms is ultimately that of the State. Turner v. Warren County Board of Education (313 F. Supp. 380; Art. VIII, §§ 1 and 2, Mich. constitution): *Dasiewicz* v. *Board of Education of the City of Detroit*, 3 N.W. 2d 71.

12. That a State's form of government may delegate the power of daily administration of public schools to officials with less than statewide jurisdiction does not dispel the obligation of those who have broader control to use the authority they have consistently with the Constitution. In such instances the constitutional obligation toward the individual schoolchildren is a shared one. *Bradley* v. *School Board, City of Richmond*, 51 F.R.D. 139, 143.

13. Leadership and general supervision over all public education is vested in the State Board of Education. Article VIII, section 3, Michigan constitution of 1963. The duties of the State board and superintendent include, but are not limited to, specifying the number of hours necessary to constitute a school day; approval until 1962 of school sites; approval of school construction plans; accredition of schools; approval of loans based on State aid funds; review of suspensions and expulsions of individual students for misconduct [Op. Atty. Gen., July 7, 1970, No. 4705]; authority over transportation routes and disbursement of transportation funds; teacher certification and the like. M.S.A. 15.1023 (1). State law provides review procedures from actions of local or intermediate districts (see M.S.A. 15.3442), with authority in the State board to ratify, reject, amend or modify the actions of these inferior State agencies. See M.S.A. 15.3467; 15.1919(61); 15.1919(68b); 15.2299(1); 15.1961; 15.3402; *Bridgehampton School District No. 2 Fractional of Carsonville, Mich.* v. *Superintendent of Public Instruction*, 323 Michigan 615. In general the State superintendent is given the duty "[t]o do all things necessary to promote the welfare of the public schools and public educational instructions and provide proper educational facilities for the youth of the State." M.S.A. 15.3252. See also M.S.A. 15.2299 (57), providing in certain instances for reorganization of school districts.

14. State officials, including all of the defendants, are charged under the Michigan constitution with the duty of providing pupils an education without discrimination with respect to race. Article VIII, section 2, Michigan constitution of 1963. Article I, section 2, of the constitution provides:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

15. The State department of education has recently established an equal educational opportunities section having responsibility to identify racially imbalanced school districts and develop desegregation plans. M.S.A. 15.3355 provides that no school or department shall be kept for any person or persons on account of race or color.

16. The State further provides special funds to local districts for compensatory education which are administered on a per school basis under direct review of the State board. All other State aid is subject to fiscal review and accounting by the State. M.S.A. 15.1919. See also M.S.A. 15.1919(68b), providing for special supplements to merged districts "for the purpose of bringing about uniformity of educational opportunity for all pupils of the district." The general consolidation law M.S.A. 15.3401 authorizes annexation for even noncontiguous school districts upon approval of the superintendent of public instruction and electors, as provided by law. Opinion Attorney General, February 5, 1964,

No. 4163. Consolidation with respect to so-called "first class" districts, i.e., Detroit, is generally treated as an annexation with the first class district being the surviving entity. The law provides procedures covering all necessary considerations. M.S.A. 15.3184, 15.3186.

17. Where a pattern of violation of constitutional rights is establishing, the affirmative obligation under the 14th amendment is imposed on not only individual school districts, but upon the State defendants in this case. *Cooper* v. *Aaron*, 358, U.S. 1; *Griffin* v. *County School Board of Prince Edward County*, 337 U.S. 218; *U.S.* v. *State of Georgia*, Civ. No. 12972 (N.D. Ga., Dec. 17, 1970), rev'd on other grounds, 428 F. 2d 377; *Godwin* v. *Johnston County Board of Education*, 301 F. Supp. 1337; *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala.), aff'd sub nom., *Wallace* v. *U.S.*, 389 U.S. 215; *Franklin* v. *Quitman County Board of Education*, 288 F. Supp. 509; *Smith* v. *North Carolina State Board of Education*, No. 15,072 (4th Cir., June 14, 1971).

The foregoing constitutes our findings of fact and conclusions of law on the issue of segregation in the public schools of the city of Detroit.

Having found a de jure segregated public school system in operation in the city of Detroit, our first step, in considering what judicial remedial steps must be taken, is the consideration of intervening parent defendants' motion to add as parties defendant to a great number of Michigan school districts located out county in Wayne County, and in Macomb and Oakland Counties, on the principal premise or ground that effective relief cannot be achieved or ordered in their absence. Plaintiffs have opposed the motion to join the additional school districts, arguing that the presence of the State defendants is sufficient and all that is required, even if, in shaping a remedy, the affairs of these other districts will be affected.

In considering the motion to add the listed school districts, we pause to note that the proposed action has to do with relief. Having determined that the circumstances of the case require judicial intervention and equitable relief, it would be improper for us to act on this motion until the other parties to the action have had an opportunity to submit their proposals for desegregation. Accordingly, we shall not rule on the motion to add parties at this time. Considered as a plan for desegregation, the motion is lacking in specificity and is framed in the broadest general terms. The moving party may wish to amend its proposal and resubmit it as a comprehensive plan of desegregation.

In order that the further proceedings in this cause may be conducted on a reasonable time schedule, and because the views of counsel respecting further proceedings cannot but be of assistance to them and to the Court, this cause will be set down for pretrial conference on the matter of relief. The conference will be held in our courtroom in the city of Detroit at 10 o'clock in the morning, October 4, 1971.

Stephen J. Roth,
U.S. District Judge.

September 27, 1971.

U.S. *v.* BOARD OF SCHOOL COMMISSIONERS, INDIANAPOLIS

IP-C 225 (S.D. Ind. 1971)

MEMORANDUM OF DECISION

This action, filed May 31, 1968, was tried by the court on July 12–21, 1971. The court has considered the voluminous testimony, the more than 200 exhibits, the posttrial briefs, has taken judicial notice of certain historical facts believed to be matters of common knowledge, and now files its findings of fact and conclusions of law in the form of this memorandum. Rule 52(a), Federal Rules of Civil Procedure.

I. General

This is a school desegregation action brought by the United States pursuant to section 407 (a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000c–6 (a) and (b). The defendants are the Board of School Commissioners of Indianapolis, Ind. (hereinafter "school board" or "board"), the members of the board, and its appointed superintendent of schools.

The defendant school board is a common school corporation organized and existing under the laws of the State of Indiana. It is situated within Marion County, Ind., and governs, manages, and controls all of the public elementary and high schools within a geographical area known as the school city of Indianapolis (hereinafter "school city"), all as required by Indiana law. The shape of the school city resembles that of a trussed fowl, with its head to the north, its bound feet to the south, and its flapping wings extending east and west. The east-west wingspread, at its greatest, is about 16 miles. The north-south dimension of the school city is about 13 miles.

During the 1970–71 school year, the school board operated 110 elementary schools. The usual (but not invariable) grade structure of the elementary schools was a kindergarten through eighth-grade structure. Among these 110 schools were six junior high schools. During the 1970–71 school year, two of the elementary schools were devoted entirely to the education of mentally retarded children, and one of the elementary schools was devoted entirely to the education of physically handicapped children and children having both physical and mental handicaps.

During the 1970–71 school year, the school board operated 11 high schools. With the exceptions hereinafter noted, each of these high schools housed students in grades nine through twelve who had attended one of the "feeder schools" regularly assigned to the particular high school. The exceptions to these general statements are that Crispus Attucks High School (hereinafter "Cripus Attucks") housed students in grades 10 through 12 only, its ninth grade class having been divided between the newly acquired Cold Spring Campus and Northwest High School (hereinafter "Northwest") and that Shortridge High School (hereinafter "Shortridge") housed a ninth grade made up of students from assigned "feeder schools" and three classes of students who were attending Shortridge under "the Shortridge Plan." Also, a comparatively small number of students were transferred to high schools other than those to which originally assigned, pursuant to the transfer policies of the board.

The total enrollment in the elementary schools at the close of the 1970–71 school year was 77,658 students (excluding special education students). Negro students constituted 37.4 percent of that total. The total enrollment in the high schools at that time was 22,487 students. Negro students constituted 33.6 percent of that total. There were approximately 4,379 faculty members, of whom 976 (22 percent) were Negro.

Of the seven persons currently serving as members of the school board three are Negroes (Mrs. Cary D. Jacobs, the Rev. Landrum E. Shields, and Mr. Robert D. DeFrantz). Mr. Shields served as president of the school board from the date of the board's first meeting in July 1970 until July 13, 1971, on which latter date Mr. DeFrantz was elected to the presidency, in which position he presently serves. The board does not appear to be polarized along racial lines, and the personnel of central administration, operating under the direction of the superintendent, likewise reflects a reasonable racial balance.

On February 6, 1970, an Indiana not-for-profit corporation, Citizens of Indianapolis for Quality Schools, Inc., attempted to intervene herein as a party defendant, asserting that its membership consisted exclusively of parents of students in the Indianapolis public schools who possessed a legally cognizable interest in the proceeding on such account. The motion to intervene was accompanied by petitions executed by some 5,000, more or less, parents who requested such intervention. The petition to intervene was denied by the court, for the reason that the corporation did not appear to have an interest sufficient to permit intervention as of right pursuant to (Rule 24(a)(2), F.R.C.P. *Hobson* v. *Hansen*, D.C. Dist., 1968, 269 F. Supp. 401; *Blocker* v. *Board of Education of Manhassett, N.Y.*, E.D.N.Y., 1964, 229 F. Supp. 714). Permissive intervention was also denied. However, Mr. Harold E. Hutson, attorney for the petitioner, was permitted to appear as amicus curiae, and in such capacity he attended the trial, was furnished with copies of all exhibits, and participated in the argument and posttrial briefing.

II. THE ISSUES

There are but two ultimate factual issues in this case, and two critical dates. The two dates are May 17, 1954, the date of the decision of the Supreme Court of the United States in *Brown* v. *Board of Education of Topeka* ("*Brown I*") (347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 38 ALR2d 1180), and May 31, 1968, the date on which this suit was filed.

Brown I, of course, held that in the field of public education the doctrine of "separate but equal" has no place, and that segregation of children in public schools by operation of law solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprives the children of the minority group of equal educational opportunities and hence of the equal protection of the laws guaranteed by the 14th amendment. Approximately 1 year later, in the same case ("*Brown II*") (349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083), the Court ordered the district courts involved in *Brown* and its companion cases "to take such proceedings and enter such orders and decrees . . . as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." It thereupon became the duty of all of the States, operating through their various agents, that is, boards of school commissioners and the like, such as the defendant board, to desegregate such school corporations as were practicing *de jure* segregation of their pupils as of May 17, 1954.

The two ultimate issues herein may therefore be stated as follows:

> 1. Did the school board operate a dual school system, or, put another way, did it have a deliberate policy of segregating minority (Negro) students from majority (white) students in its schools on May 17, 1954?
>
> 2. If the answer to the first question is in the affirmative, had the board changed its policy so as to eliminate such *de jure* segregation on or before May 31, 1968?

The plaintiff United States of America has the burden of proving the affirmative of the first issue and, if proved, the negative of the second. The defendants deny *de jure* segregation on either of the critical dates, and further urge that a third critical date must be considered: the date of trial. Their argument in the latter connection is that no matter what may have gone before, if the board is operating a unitary system as of the date of trial there is no justification for judicial intervention or for the granting of relief in equity.

As will be set out in more detail hereafter, the Court finds for the plaintiff on each of the ultimate issues of fact. The argument that conditions as of the date of trial should control the action is rejected, first for the legal reason that complaints, and the proof of same, must relate to conditions as of the date of filing; plaintiff is always entitled to judgment, if only for costs, if it proves the essential elements of its complaint as of such time. It is true that the initiation of a legal action may, and frequently does motivate the defendant to grant all or part of the relief sought prior to trial, thus rendering the action moot in whole or in part. In a simple action such as a suit on account, where the only relief sought is money, it is obvious that payment in full by the defendant before trial would effectively render the action moot for all time, save for payment of costs. Where the relief sought is equitable, however, particularly in a complex case such as this where the equitable relief sought is affirmative rather than being limited to a negative injunction, voluntary compliance in advance of trial would not deprive the Court of jurisdiction to insure the continuation of such compliance by appropriate orders. In any event, however, the Court finds that the board had not, as of the date of trial, effectively desegregated its school system to the extent required by *Brown II*.

III. HISTORY

Perhaps one of the greatest public misunderstandings as to the operation of the public schools of the State of Indiana is that the responsibility for the conduct of such schools is purely local. It is not difficult to understand the basis for such misconception as the schools are, as a practical matter, operated by local boards, locally elected, subject only to the general oversight of the Indiana State Board of Education and the State Superintendent of Public Instruction. They are paid for to a large extent by funds derived from local property taxes. That part of the property tax allocated to the funding of the public school system constitutes by far the largest portion of the taxes levied in every taxing unit of the State. (The 1971–72 budget adopted by defendant board is in excess of $82 million.)

Nevertheless, the fact remains that the ultimate responsibility for the public schools, and the duty to provide a "general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all" is placed squarely upon the State.[1] It has therefore been held in numerous cases that the State school system is a State institution, and that school corporations organized under, or by virtue of, the laws of the State are but the agents of the State.[2] Therefore, in reviewing briefly the events leading up and contributing to the educational plight of the Negro in Indianapolis in 1954, 1968, and at present, it is necessary and proper to consider historic policies of the State and various of its agencies, as well as the acts and omissions of the board itself.

A. TERRITORIAL ATTITUDES

The first 20 Africans who lived within the boundaries of what later became the original 13 States landed at Jamestown, Va., in 1619, thus predating by a year the more highly publicized landfall at Plymouth Rock. In early Virginia, as in other colonies, the first Negro settlers were free, and accumulated land, voted, testified in court and mingled with whites on a basis of equality.[3] Unfortunately for them and their progeny, in the 1660's Virginia, Maryland, and other States enacted the first of a series of laws which later led to the establishment of slavery on the basis of race, with results which are well known.

Virginia and Virginians played major roles in the early history of Indiana. At one time Kentucky was merely a county of that Commonwealth, which also claimed all of the lands north and west of the Ohio River, east of the Mississippi and south of Canada. Many of the earliest white settlers of Indiana were Virginians and they, together with persons of similar background from Kentucky and the Carolinas, all States where slavery was practiced, made up the majority. When Virginia ceded the Northwest Territory in 1784, it was pursuant to a reservation of land to be donated to Gen. George Rogers Clark and members of his Virginia regiment for services rendered in the Revolutionary War,[4] and such grants were made—many for tracts in Indiana. The first territorial governor of the Indiana Territory, following its establishment in 1800, was William

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[1] Constitution of the State of Indiana, 1851, art. 8, § 1.

[2] *Ratcliff* v. *Dick Johnson School Twp.*, 1933, 204 Ind. 525, 185 N.E. 143; *Greathouse* v. *Board of School Com'rs*, 1926, 198 Ind. 95, 151 N.E. 411; *Ehle* v. *State ex rel Wissler*, 1922, 191 Ind. 502, 133 N.E. 748; *School Town of Windfall City* v. *Somerville*, 1914, 181 Ind. 463, 104 N.E. 859; *Jordan* v. *Logansport*, 1912, 178 Ind. 629, 99 N.E. 1060; *State ex rel Warren* v. *Ogan*, 1902, 159 Ind. 119, 63 N.E. 227; *Freel* v. *School City of Crawfordsville*, 1895, 142 Ind. 27, 41 N.E. 312.

[3] L. Bennett, Jr., Before the Mayflower, 29–36 (3d ed. 1966).

[4] Act of Virginia, Dec. 20, 1783. 1 Burns Ind. Stat. Ann. 369 (1955 Repl.)

Henry Harrison, another Virginian. The son of an influential Virginia planter, he could scarcely have avoided the culture of the southern country gentleman.[5]

The racial attitudes of Harrison and the early settlers of the territory (which also included, among other land, all of present day Illinois) quickly became apparent. Although article 6 of the Ordinance of 1787, providing for the government of the Northwest Territory, prohibited slavery and involuntary servitude in the territory,[6] which provision was carried forward to the Indiana Territory,[7] they set about immediately to secure the repeal or suspension of article 6.[8] When the Congress failed to act favorably upon their repeated requests, Harrison and the territorial judges, acting in their legislative capacity, went so far as to adopt a law in 1803 providing that Negroes and mulattoes brought into the territory must perform the service due their masters and the contracts between master and servant were assignable.[9] Another such law provided that slaves purchased outside Indiana and brought within the territory had the Hobson's choice of agreeing to being bound to service, or of being taken out of the territory (presumably for resale).[10] Some Negroes were bound to service under indentures for as long as 99 years.[11]

B. STATEHOOD: GENERAL POLICIES

Statehood brought no immediate change. Although slavery was once again prohibited, it was noteworthy that of 1,326 Negroes counted in the 1820 census, 503 were candidly listed as slaves.[12] Discrimination became the official policy of the State, as evidenced by the successive Constitutions of 1816 and 1851, and by the laws enacted by the General Assembly. For example, both Constitutions limited the right to vote [13] and to serve in the militia [14] to white males; these restrictions were not removed until the adoption of constitutional amendments in 1881 and 1936, respectively. A statute of 1818, similar to one enacted during the territorial period, declared that no person with a fourth or more of Negro blood could give testimony in court in a case involving a white party.[15]

Intermarriage between whites and persons of Negro blood was likewise prohibited in 1818.[16] Subsequently, the act was clarified so as to extend the prohibition to a person having one-eighth part or more of Negro blood, and made violation a felony punishable by a fine and imprisonment for from 1 to 10 years. Such statute, as it existed in 1871, was unanimously held constitutional by the Supreme Court of Indiana,[17] notwithstanding the adoption in 1868 of the 14th Amendment to the Federal Constitution, the last reenactment of such law [18] was not repealed until 1965. Similarly, an 1852 act [19] declared such marriages to be void, thus creating obvious limitations on the right of inheritance and other legal benefits upon the death of a spouse.[20] This law, too, was not repealed until 1965.

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[5] J. Barnhart & D. Riker, Indiana to 1816, at 315 (1971) (hereinafter "Barnhart & Riker").

[6] 1 Burns Ind. Stat. Ann. 376 (1955 Repl.).

[7] Act of May 7, 1800. 1 Burns Ind. Stat. Ann. 380 (1955 Repl.).

[8] See generally Barnhart & Riker, 334–335, 347–354.

[9] Philbrick (ed.), Laws of Indiana Territory, 1801–1809, at 42–46.

[10] Ibid., 136–139.

[11] E. Thornbrough, Since Emancipation, 1 (1963) (hereinafter "Thornbrough").

[12] W. Heiss (ed.), 1820 Federal Census For Indiana (1966).

[13] Constitution of 1816, Art. 6 § 1; Constitution of 1851, Art. 2 § 2.

[14] Constitution of 1816, Art. 7 § 1; Constitution of 1851, Art. 12 § 1.

[15] Acts 1818, ch. 3, § 52, p. 39.

[16] Acts 1818, ch. 5, § 59, p. 94.

[17] State v. Gibson, 1871, 36 Ind. 389.

The most striking evidence of the hostility of the white majority was shown in efforts to exclude Negroes from the State and to persuade those already in the State to leave. A law of 1831, which was seldom enforced, required Negroes coming into the State to post bond as a guarantee against becoming a public charge and as a pledge of good behavior. More drastic was article 13 of the Constitution of 1851 which flatly prohibited Negroes and mulattoes from coming into the State and which provided for penalties for persons who encouraged them to come. Closely linked to the exclusion movement was the colonization movement, which sought to preserve the soil of Indiana for white men by sending Negro residents to Africa. A State colonization society, affiliated with the American Colonization Society, had been organized in 1829 but had never accomplished much. Article 13 of the Constitution of 1851 contained a section encouraging colonization. For several years the State legislature appropriated money for a colonization fund and paid the salary of a State agent who was supposed to encourage Negroes to emigrate to Africa.[21] Article 13 was held to be null and void in 1866.[22]

In 1885, the general assembly passed a civil rights law providing that all persons within the jurisdiction of the State were entitled to full and equal enjoyment of the accommodations of "inns, restaurants, eating-houses, barber shops, public conveyances on land and water, theaters, and all other places of public accommodation and amusement;" such law also prohibited discrimination because of race or color in the selection of jurors.[23] It is common knowledge that until the past decade, many parts of this law were more honored in their breach than in their observance, particularly as to the first four categories, often with an assist from the judicial arm of the State.[24] Negroes were rarely admitted, save on a segregated basis, to theaters,[25] public parks, and the like, including State parks operated by the Indiana Department of Conservation, until after World War II. They were confined to segregated wards in public hospitals supported by tax funds, and, as we shall see, largely attended segregated schools.[26]

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[18] Acts 1905, ch. 169, §§ 638, 639, p. 584.

[19] R.S. 1852, ch. 67, § 2, p. 361.

[20] As recently as 1940 the 1852 Act was raised in defense of a claim for death benefits under the Indiana Workmen's Compensation Act, the contention being that the widow, a Negro, could not have been married to the decedent because he was white. The Appellate Court held the defense good as a matter of law, if proved, but affirmed the Industrial Board's award to the widow on the interesting ground that the decedent, a Mexican, had not been proved to be "white." Inland Steel Co. v. Barcena, 1942, 110 Ind. App. 551, 39 N.E. 2d 800.

[21] Thornbrough, p. 2.

[22] Smith v. Moody, et al, 1866, 26 Ind. 299.

[23] Acts 1885, ch. 47, p. 76.

[24] See, for example, the ingenuous decision in *Chochos*, et al, v. *Burden*, et al, 1920, 74 Ind. App. 242, 128 N.E. 696, wherein two Negro women refused service in a Greek candy kitchen selling ice cream, soda water, etc., for consumption on the premises had their judgments for nominal damages reversed on the ground that such an establishment did not constitute an "eating-house."

[25] In 1932, when an Indianapolis movie house opened its doors free to Butler University students in celebration of a football victory, Negro students were barred. Thornbrough, p. 88. (Presumably, however, the celebrants all marched to the tune of "*Butler Will Shine Tonight*," the school cheer song written, when a student, by Noble Sissle, an Indianapolis Negro. Sissle went on to national fame as a musician, composer, orchestra leader, and writer/producer of successful Broadway musicals.)

C. HOUSING POLICY

Before turning attention to the schools, however, another area of segregation needs mention, and that is in the matter of housing. Just as was the case in Virginia, so in Indianapolis persons of African descent were present from the beginning. It has been recorded that on the very mission which resulted in the location of the new State capitol on the banks of Fall Creek, Governor Jennings was accompanied by a Negro boy known to history only as Bill.[27] More to the point, Ephriam Ensaw, a freed man who worked for wages, settled in the new town, along with various white settlers, even before the surveyors had finished staking the lots.[28] However, by the time the first German and Irish immigrants had been imported in 1836 to work on the Central Canal, most Negroes were to be found in "Colored Town," on the outskirts of the mile square,[29] and were later concentrated in the area around Indiana Avenue.

Segregation in the housing of Negroes in Indianapolis has persisted at least until the date of the filing of this action.[30] As the evidence in this case discloses without conflict, Negroes were discouraged from purchasing homes in predominately "white" neighborhoods by various methods: White realtors refused to show such homes to Negroes (and no Negro real estate broker was permitted to become a member of the Indianapolis Real Estate Association until 1962), a two-price system was used: A realistic market price to whites and a ridiculously inflated price to Negroes, lending institutions refused to finance homes sought to be purchased by Negroes in white areas. Those pioneering Negroes who nevertheless overcame all obstacles and succeeded in purchasing such a home were then harassed by such devices as threatening and obscene telephone calls, stones hurled through window, neighborhood ostracism, et cetera.[31] Certain streets and other landmarks, such as Fall Creek, White River, certain railroad tracks, et cetera, were regarded at different time as barriers to be huddled by Negroes at their peril.

In addition to pressures of the foregoing type, applied by individual whites, residential segregation was also enforced by law, in many instances. Perhaps the best known method was by means of the racial covenant which, when inserted into a deed or plat of a real estate subdivision, limited ownership of the lot to persons of the white race. As may be noted from a cursory observation of plats recorded in the plat books kept in the office of the recorder of Marion County, many of the better known subdivisions, such as Williams Creek Estates, Broadmoor Estates, Meridian Hills, Highswood Addition, Forest Hills, Wellington Estates, Fall Creek Highlands, Greenslopes, Wynedale, Ellenberger Plaza, and Meridian-Kessler Terrace, contained such covenants, which were routinely enforced until held unconstitutional in 1948.[32]

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[26] For an extended discussion of these and similar examples of State imposed or tolerated segregation, see Thornbrough, pp. 86–93.

[27] Leary, Indianapolis, the Story of a City (1970), p. 8 (hereinafter "Leary").

[28] Ibid., p. 13.

[29] Ibid., p. 50.

[30] The Civil Rights Act of 1968, Public Law 90–284, 82 Stat. 81, 42 U.S.C. §§3601 et seq. was not fully effective until December 31, 1969, and its effects have barely begun to be felt.

[31] One who received such treatment was Mr. Grant Hawkins, a graduate of Indiana University, successful businessman, and first Negro member of the school board. For a more detailed discussion, see Thornbrough, pp. 22–29.

As shown by the evidence herein, the city of Indianapolis took official action to enforce segregation in 1926 when the city council, with only one dissenting vote,[33] adopted General Ordinance No. 15, making it unlawful for any Negro "to establish a home-residence on any property located in a white community or portion of the municipality inhabited principally by white people . . . ." or for a white person to commit the same act in a Negro community. The ordinance imposed a fine and imprisonment for violation, and further provided that each 7 days maintenance of such a residence would be deemed a separate offense.[34] Passage of the ordinance was noted by the Indianapolis News, then and now one of Indiana's leading newspapers, which stated that "Sincere convictions are represented in the ordinance . . ." and "Patience and forbearance are called for." [35] When the Marion Circuit Court held the ordinance unconstitutional a short time later, The Indianapolis News had a plan of action. "One thing should be done as soon as possible," it editorialized, "and that is to pave the streets in colored neighborhoods, and make them so attractive that there will be no desire to get out of them . . . The surroundings should be made as good as those in white sections, so that there may be no reason for leaving them." [36] As recently as July 4, 1963, the major Indianapolis newspapers, in their real estate want ad columns, used the designation "for colored," or "col." in describing residential property in certain sections of the city.

It is common knowledge that in many small towns and a few larger ones in Indiana the custom that Negroes were not allowed to stay overnight was so inviolable that it had the force of law and was actually enforced by local officials.[37] Thus today it is noticeable that almost no Negroes are to be found in communities adjoining the school city of Indianapolis. Marion County has three municipalities other than Indianapolis, all contiguous to the school city. Beach Grove, an industrial community of 13,432, has a Negro population of 19. Speedway City, a similar type community, has 68 Negroes out of a total population of 14,951, while Lawrence has 216 Negroes out of a total population of 18,997. Of Marion County's 792,299 residents, 134,474 or 17 percent are Negro. Of these, approximately

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[32] The plats of Kessler Park and Crippin's River Park Addition were recorded with racial covenants in 1949, after they had already been held unconstitutional by the Supreme Court in *Hurd* v. *Hodge*, 1948, 334 U.S. 24, 68 S. Ct. 847, 92 L. Ed. 1187.

[33] Hon. Edward B. Raub voted in the negative.

[34] The mayor and most members of the city council of this period (not including Raub) had been elected with the support of the Ku Klux Klan. For a short summary of the Klan era see Leary, ch. 23.

[35] The Indianapolis News, editorial, Mar. 16, 1926.

[36] Ibid., Nov. 24, 1926.

[37] Thornbrough, p. 21.

122,086, or 98.5 percent are confined to the central area served by the defendant school board.[38]

The Bureau of the Census recognizes approximately 250 standard metropolitan statistical areas in the 1970 census.[39] Such an area is a county or group of contiguous counties which contains at least one city of 50,000 or more inhabitants and which, according to certain criteria, are socially and economically integrated with the central city. The Indianapolis Metropolitan Statistical Area has 1,109,882 inhabitants and includes, in addition to Marion County, the contiguous counties of Boone, Hamilton, Hancock, Hendricks, Johnson, Morgan, and Shelby. The 1970 census figures reflect a total of 2,849 Negroes out of a total population of 317,583 residing in these seven suburban counties, a percentage of 0.897.

D. SCHOOL POLICIES TO 1949

In early Indiana, as has been seen, the Negro lacked many of the rights which are the ordinary attributes of citizenship. The plain fact is that, although entitled to certain rights under Indiana law, such as the right to own property and the right to personal liberty, Negroes were not considered to be citizens of the State until the adoption of the 14th amendment to the Constitution of the United States.[40] For this reason, many of the rights conferred upon citizens by the successive Indiana constitutions were construed as not applying to Negroes.

Thus in an early case it was held that Negro children could not attend school with white children over the protest of a white parent, even if they paid their own tuition.[41] A statute in force in 1861 barred Negroes, mulattoes, and the children of mulattoes from admission to the common schools.[42] After the adoption of the 14th amendment, the general assembly in 1869 enacted a law providing, for the first time, for the education of Negro children, but providing also for them to be organized into separate schools. The statute provided that if there were not a sufficient number of such children within attending distance to form a school in one district, several districts could be consolidated; and if there were not enough to be consolidated within a reasonable distance, "the trustee . . . shall provide such other means of education for said children as shall use their proportion, according to members, of school revenue to the best advantage." [43]

The case of *Corey, et al.* v. *Carter* [44] was commenced by Carter, a Negro parent of school-age children, against the school officials of Lawrence Township, Marion County, to compel them to accept his children as pupils in the "white" district school, such officials having failed to provide any school in that or any adjoining district near enough for his children to attend, whereby they were denied the right to attend any school at all. He secured an order of mandate from the Marion Superior Court, but the Supreme Court reversed, holding that under the 1869 act, Negro children were not entitled to admission in common schools provided for the education of white students. This holding was reaffirmed in subsequent cases.[45]

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[38] All statistics are based upon the 1970 census.

[39] Bureau of the Budget, Standard Metropolitan Statistical Areas (1967, as supplemented).

[40] *Cory, et al*, v. *Carter*, 1874, 48 Ind. 327.

[41] *Lewis* v. *Henley, et al*, 1850, 2 Ind. 332.

[42] *Draper, Trustee, et al*, v. *Cambridge*, 1863, 20 Ind. 268.

[43] Acts 1869, ch. 16, sec. 3, p. 41.

[44] Note 40, supra.

In about 1868, Indianapolis erected a new schoolhouse and, anticipating the 1869 legislation, assigned the old building on Market Street for the education of Negro children.[46] A separate elementary school was opened there in the fall of 1869. Thus, at the very inception of public education for the Indianapolis Negro child, he was segregated by virtue of State law. As will be demonstrated later, de jure segregation in the elementary schools continued virtually without change until this action was filed, 100 years later. The situation with respect to high schools has taken a more erratic course.

Indianapolis's first high school was Shortridge, followed by Emmerich Manual Training and Arsenal Technical. For more than 50 years, no separate high school for Negro students was established, and after 1877, schoolchildren of both races were permitted to select the high school of their choice, attending on an integrated basis.[47] However, with impetus provided by a petition from the Indianapolis Chamber of Commerce, the school board on December 22, 1922, adopted a resolution authorizing the construction of a "colored high school." When such school, Crispus Attucks, was opened in September 1927, all Negro high school students were forthwith compelled to attend it, regardless of their place of residence in the city. In 1935, chapter 16 of the acts of 1869 was further amended to require the board to provide transportation for Negro students required to travel more than a certain distance by reason of its segregation policies.[48] Thus was instituted the policy of tax-paid transportation of school children (busing).

Another act of the 1935 General Assembly is instructive. A law enacted in 1907 had directed township trustees to abandon all schools under their charge at which the average daily attendance had been 12 or fewer pupils. The 1935 act [49] added the following proviso: "Provided, further, that nothing in this act, or in the act to which it is amendatory, shall authorize the discontinuance of any school exclusively for colored pupils where such school is the only school for colored pupils in such school corporation, and any such school heretofore discontinued by the operation of such act shall be reestablished." (In sum, trustees were ordered by the State to furnish a separate school building and teacher for the instruction of, for example, one Negro child attending primary school, rather than permit that child to attend a white school.)

In 1947, two bills were introduced in the General Assembly, each of which had as its purpose the elimination of segregation based on race, color, creed, et cetera, in the public school system. In due time, a publice hearing was held on one of the bills by the House Committee on Education, at which time the then superintendent of schools of defendant board, pursuant to its authorization, appeared and spoke in opposition. Neither bill passed. However, in 1949, an act was passed which required desegregation on a phased basis.[50] Thus ended, at least for a time (see part VII), the official State policy of segregation.

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[45] *Greathouse v. Board of School Com'rs*, 1926, 198 Ind. 95, 151 N.E. 411; *State, ex rel. Mitchell v. Gray, et al., School Trustees*, 1883, 93 Ind. 303; *State, ex rel. Oliver, et al. v. Grubb, Trustee*, 1882, 85 Ind. 213.

[46] Leary, p. 118.

[47] Acts 1877, ch. 81, § 1, p. 124, had amended ch. 16 of the acts of 1869 to require admission of Negro students to white schools, if no separate school of comparable grade was provided for Negroes.

[48] Acts 1935, ch. 296, § 1, p. 1457.

[49] Acts 1935, ch. 77, § 1, p. 231.

IV. Board Policies, 1949–54

As has been shown, the official policy of the State of Indiana and of its agent, the defendant school board, was one of de jure separation of its Negro and white students prior to 1949. During the 1948–49 school year, only 614 out of a total of 11,304 Negro students (5.4 percent attended regular elementary schools of racially mixed population. The other 10,690 pupils attended 16 all-Negro elementary schools and all-Negro Crispus Attucks High School. The faculty and staff of each school was completely segregated, and the superintendent's administrative staff was all white. Generally, Negro schools were built in Negro residential areas and white schools in white areas; and when residential patterns were mixed, Negro and white attendance zones overlapped. Grade structures were altered to achieve segregation in some instances. Negro students in the elementary grades were required to walk, or were transported to all-Negro schools when there were schools, serving only white students, closer to their homes. None of these facts are denied by the defendants.

The 1949 act which abolished segregation in the public schools, required segregated districts to begin desegregating a grade a year by permitting those students enrolling for the first time in kindergarten, the first elementary grade, and the first junior and senior high school grades to enroll in the school nearest their homes. Accordingly, the board adopted a policy which, on its face, generally followed the provisions of the statute.[51]

In some instances where desegregation would have resulted if children had been assigned to the closest school, they were assigned to segregated schools farther from their homes. The board's construction policies during the period 1949–53 minimized the amount of desegregation that occurred. The formerly "colored" elementary schools generally remained all-Negro. Likewise, though specific student assignments were made for all high schools, Crispus Attucks remained all Negro. With one exception, students attending the all-Negro elementary schools, some of which were nearer and more accessible to other high schools, were either assigned exclusively or given an option to attend Attucks; partly as a result of administrative suggestion, the option was usually exercised in favor of Attucks. Further, the transfer policies adopted by the board facilitated the maintenance of segregated high schools.[52]

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[50] Acts 1949, Ch. 186, p. 603; Burns Ind.Stat.Ann. §§ 28–6106 to 28–6112 (1970), as amended.

[51] There were, however, exceptions to this policy. School 19, serving grades 1–6 in 1948–49, did not enroll first grade pupils in 1949–50. Since it was a Negro school in a predominantly white neighborhood, white students in that neighborhood would have been required to enroll in that school under the April 1949 policy. Negro first graders who would have attended school 19, enrolled at school 64, a nearby all-Negro school, while white students in the school 19 area attended white school 20.

At the close of the 1952 school years, the board drew fixed boundary lines for all elementary schools.[53] These boundary lines were drawn with knowledge of racial residential patterns and the housing discrimination underlying it. Not only did the board not attempt to promote desegregation, but the boundary lines tended to cement in the segregated character of the elementary schools. In some instances, segregation was promoted by drawing boundary lines which did not follow natural boundaries or were not equidistant between schools.[54] In some instances, optional attendance zones between white and Negro schools were adopted in racially integrated neighborhoods. From 1949 to 1953, the high school assignments were maintained in the same segregatory pattern, and the creation of the predominantly white Harry E. Wood High School on the Manuel High School campus helped perpetuate the segregation of nearby Crispus Attucks.

At the time of the Supreme Court decision in *Brown I* in May 1954, the situation was as follows: Of the 16 "colored schools" as of 1949, two were closed, one was converted to an all-white school,[55] one was, subsequently, considered part of the Crispus Attucks "junior division," and the other 12 were 97.5 percent, or more, Negro. Of 2,787 Negro high school students, 1,618 attended Crispus Attucks, and faculty desegregation was minimal. The board thus began the post-*Brown I* era in May 1954, in substantially the same position that it ended the official segregation era in 1949. The schools were still segregated by operation of law, by virtue of the acts and omissions of the board done in defense of the new requirements of Indiana law.

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[52] One reason for transfers to be given "special consideration" was if a pupil had an older sibling attending the preferred high school. This operated as a grandfather clause permitting white students to escape Attucks, and remained in effect through March 1970. Furthermore, proximity per se was not a legitimate reason for transfer, unless a student lived more than 2 miles from the assigned high school; this prevented Negro students who lived within 2 miles of Attucks from transferring to other high schools which were closer to their residences.

[53] Negro students were, nevertheless, bused to Negro schools outside their attendance zones from racially mixed areas in at least two cases.

[54] For example, the common boundary between schools 36 (99.3 percent Negro in 1953–54) and 60 (11.6 percent Negro) was within one block of school 36 and some eight to 10 blocks from school 60. The boundary between schools 42 (100 percent Negro) and 44 (1.2 percent Negro) required Negro students in one area south of school 42 to cross a canal, a parkway, and two railroad tracks to get to school 42; no such impediment stood between this area and school 44. The school 26 (99.8 percent Negro) common boundary with school 10 (9.7 percent Negro) required Negro students in the western one to three blocks of the school 26 zone to cross five railroad tracks to get to school 26; no such impediment existed between this area and school 10.

[55] School 19 was converted from an all-Negro nonneighborhood school to an all-white nonneighborhood school in September 1953. Almost all the Negro pupils who had attended school 19 were assigned to school 64, as school 64's attendance zone was redrawn to include almost all the Negro students in the area. School 19 served, in 1953–54, two noncontiguous white areas and was located in neither of them.

V. Board Policies, 1954–68

From the date of *Brown I* to the date of this action, the board continued the student and faculty assignment policies of the previous era without change.

Since 1954, the most notable nonracial characteristic of the school system has been growth. The total number of elementary pupils rose from 53,352 in 1954–55 to 82,853 in 1967–68, while the number of schools rose from 87 regular elementary and junior high schools and eight regular high schools in 1954–55 to 113 regular elementary and junior high schools and 11 regular high schools in 1967–68. This growth caused overcrowding problems in many schools at one time or another, and the board had available, and employed, various techniques to deal with this overcrowding.

Among these techniques were attendance zone boundary changes, the construction of additions, the construction of new schools, the provision of transportation or the adjustment of existing transportation, alteration in grade structures, and the location or relocation of special education classes in elementary schools. Often these techniques were combined; for example, in the construction of an addition and a simultaneous boundary change to relieve overcrowding at two contiguous schools.

The defendant board has constructed, numerous additions to schools since 1954; more often than not the capacity thus created has been used to promote segregation. It has built additions at Negro schools and then zoned Negro students into them from predominantly white schools;[56] it has built additions at white schools for white children attending Negro schools; it has generally failed to reduce overcrowding at schools of one race by assigning students to use newly built capacity at schools of the opposite race.[57] The board has also constructed simultaneous additions at contiguous predominantly white and Negro schools,[58] and has installed portable classrooms at schools of one race with no adjustment of boundaries between it and neighboring schools of the opposite race.

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[56] For example, the board, after hearing complaints about the number of Negroes at school 60, completed the construction of 12 classrooms at school 36 (99.9 percent Negro) in September 1959, and zoned some 80 students, a predominantly Negro, from school 60 into school 36. Other students, predominantly white, were assigned to school 60 from school 76.

[57] In 1954–55 school 37 (100 percent Negro) was 104 students over capacity; neighboring school 51 (100 percent white) was 74 students over capacity. An eight-room addition was completed at school 37 in February 1956. No boundary adjustment was made between 37 and 51, however, and overcrowding at 51 persisted so that by 1958–59, it was 121 students over capacity (and only 1.7 percent Negro). Finally, in September 1960, a six-classroom addition was completed at school 73 and the boundary between school 51 (5.1 percent Negro) and school 73 (10.7 percent Negro) was adjusted so that approximately 75 pupils were sent to school 73 from 51.

[58] For example, in January 1957, nine classrooms were added to school 64's neighbor, school 21; in August 1957, six classrooms were added to school 64. In 1956–57 and 1957–58, school 21 was 99.22 percent and 98.23 percent white, and school 64 was 99.08 percent and 99.77 percent Negro. As another example, schools 27, 29, and 45 are within six blocks of one another. From 1954 to 1957 each received additions of four to eight rooms. At the time of construction, school 29 was 85.3 percent Negro, while 27 and 45 were 96.5 percent and 95.4 percent white.

The board has also constructed additions to large, predominantly Negro elementary schools when desegregation would have resulted from adding classrooms to nearby, smaller predominantly white schools.[59] These large schools have often had inadequate sites.[60] Of the four largest elementary schools in the system, all are more than 90 percent Negro, and three have had large additions constructed within the last 10 years. For example, an eight-classroom addition was completed at school 41 in January 1962, when it was 99.5 percent Negro, and had a site of 2.7 acres. For the 1970–71 year this school enrolled 1,404 pupils, 99.7 percent Negro.

An eight classroom addition was completed at school 64 (99.3 percent Negro) in September 1962. Nearby Schools 111 (100 percent white) and 112 (97.9 percent white) were purchased after annexation and opened that same month. The children from these latter schools in grades 7 and 8 were transported to school 82 even though school 64 was closer to most of these pupils.[61] This continued through the 1965–66 school year. None of these schools other than 64 was more than 4.5 percent Negro during such years, while 64 was never less than 99.3 percent Negro. Further, the faculty at school 64 was 96.4 percent Negro in 1965–66; the faculties at 82, 111 and 112 were all white that same year.

The failure to assign white children to Attucks had important consequences for the Indianapolis elementary schools. Negro students who formerly had been required to attend Attucks regardless of residence were now permitted, in some cases, to attend high schools closer to their homes. Because there was no offsetting assignment of whites to Attucks, through the arrangement of optional zones and nonneighborhood feeder assignments, the Attucks enrollment dropped substantially during the 1950's while the predominantly white high schools increased in enrollment.

Attucks thus had available space during this period, and could, and did, accommodate elementary students from overcrowded Negro elementary schools. At various times since 1954 the following schools, none of which have ever been less than 96.5 percent Negro, have been assigned to the Crispus Attucks campus: 63, 17, 23, 24, 40, and 4. Several hundred of these pupils attended school in the Crispus Attucks building during the 1950's. The assignment of students from these elementary schools to Attucks should be contrasted with the assignment of other students, predominantly white, from nearby elementary schools to Arsenal Technical High School during this same period.

During the post-1954 period, the board perpetuated segregation through the use of optional attendance zones. Specifically, in areas of racially mixed residential patterns students were given options between predominantly Negro and predominantly white elementary schools, and where entire elementary districts covered both Negro and white neighborhoods, graduates were given options between predominantly Negro and predominantly white high schools.[62] Students in Negro elementary schools were given options to Crispus Attucks when other, predominantly white high schools were closer and more accessible. White students in optional zones almost always attended white schools.

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[59] In April 1961, a survey of elementary principals was taken by the Board, requesting a "professional opinion" as to maximum, ideal, and minimum school sizes. For a K–8 school, the median ideal size designated by the 90 principals returning the questionnaire was 600; for a K–6 school, 500.

[60] The State superintendent of public instruction has established minimum acreage requirements of 7 seven acres for the first 200 students and 1 acre for each additional 100 students.

[61] The January 1967, housing facility study noted that school 82 was "quite crowded during those 4 years" that junior high students were transported to 82 from 111 and 112.

The board has perpetuated segregation through the construction of new schools. Specifically, new elementary schools to be attended by students of predominantly one race have been constructed adjacent to schools attended primarily by students of the opposite race,[63] new middle schools have been constructed to enroll the students of one race adjacent to schools attended by students of the opposite race,[64] and new high schools have been located and constructed where they have served predominantly white student populations.[65]

The board has perpetuated segregation by transporting students from overcrowded schools of one race to schools of the same race rather than to available nearby schools of the opposite race. In contrast to the current local and national hullabaloo about busing, the board's minutes record no citizen protests to the busing of white students to white schools.

The board has also perpetuated segregation in the assignment of special education classes. Specifically, it has maintained predominantly Negro and predominantly white special education departments at contiguous Negro and white schools and has shifted special education classes between schools with a resultant increase in segregation.[66]

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[62] School 32 was assigned to Shortridge until September, 1952. At that time, when 32 was 52 percent Negro, it was given an option to Attucks. By September 1964, when it was 94 percent Negro with a 100 percent Negro faculty, the option was ended and school 32 was assigned solely to Attucks. Similarly, school 44 was assigned to Shortridge until September 1955, when it was 4.1 percent Negro. At that time it was given an option to George Washington and Attucks as well as Shortridge. As the percentage of Negroes continued to rise, both the Shortridge and Washington options were dropped and the students were assigned solely to Crispus Attucks.

[63] In March, 1968, a new school 19 building was completed on a site several blocks from the previous school 19. This school was 96.3 percent white in 1968–69. Its attendance zone is still not justifiable by neighborhood standards, and its construction insured that school 64 (99.5 percent Negro in 1968–69) would remain virtually all Negro, as it in fact has. A new school 2 (90.4 percent white in 1958–59) was completed in October, 1958, containing 20 classrooms, while nearby school 40 was all Negro.

[64] Of the various types and sizes of multidistrict junior high schools established in the system since 1954, only one has involved the assignment of Negro majority and white majority schools to the same junior high school.

[65] The two most recently constructed high schools in the city (John Marshall and Northwest) have been built on the extreme northeastern and northwestern areas of the city, where the board knew they would serve virtually all-white areas. Both of these schools have in fact reinforced the growing racial isolation of the inner city.

[66] An all-Negro special education department was maintained at Attucks while an integrated department was maintained at Wood through most of this period since Wood was established in 1953. All-Negro and all-white departments have coexisted in virtually all-Negro school 64 and neighboring predominantly white School 21 almost continuously since September 1957. Predominantly Negro special education classes exist on the west side at predominantly Negro schools 63, 52, and 75, while predominantly white classes are housed at nearby predominantly white schools 30 and 16.

Special education classes often enroll students from a wider area than the normal attendance zone. Thus they can be shifted between several schools in that wider area to relieve overcrowding where necessary. The board has shifted these classes in some instances and failed to shift them in other instances, always with a resulting increase in racial segregation.

During the 1960's the board adopted a "Shortridge plan" to prevent Shortridge High School from becoming an all-Negro school. This plan had the immediate effect of reducing the number of Negro students in Shortridge, many of whom subsequently attended Attucks. No steps were taken prior to the filing of this suit, however, to desegregate Crispus Attucks, and an addition to Attucks in 1966 coupled with the effect of the Shortridge plan insured the continuation of segregation at Attucks.[67]

Some of the board's 1954–68 segregation practices are evident in simple boundary changes. For example, in 1962–63, school 69 was 57.95 percent Negro and school 11, its northern neighbor was 100 percent white. A housing facility study in February 1963, noted that, with respect to school 69:

> Census figures for the district indicate a slight decrease during the next 5 years. The nature of the district is changing considerably, which may cause a further increase; however, serious overcrowding is not anticipated in this district in the next 5 years.

Despite this assessment, the school 69–school 11 boundary was altered 3 months later and an all-white area in the school 69 district north of 38th Street was transferred to all-white school 11.[68] School 69's Negro percentage immediately rose to 72.9.

According to the evidence, there have been approximately 350 boundary changes in the system since 1954. More than 90 percent of these promoted segregation.

The results of all of the foregoing policies, coupled with the restrictive housing policies of the entire Metropolitan area, are clear: Since 1954 the percentage of Negro students in the system has increased from 20 to 36, and the segregation has likewise increased. The number of 90 percent or more Negro schools has risen from 13 to 25. In 1954–55, 85.9 percent of the Negro elementary students were in majority Negro schools; in 1968–69, the percentage had risen to 88.2. In 1968–69 Crispus Attucks was 99.8 percent Negro.[69] Faculty and staff were assigned on a racially segregated basis, meaning that Negro schools had all-Negro, or virtually all-Negro faculties, and vice versa. In short, nothing really changed during the 1954–68 period, and the Indianapolis school system on the date of this suit was filed remained segregated by operation of law.

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[67] Because of the small size of the Attucks site (8.4 acres), a waiver had to be secured from the State Board of Education. This waiver was obtained, with the proviso that no more than 2,200 students attend Attucks; nevertheless, in 1967–68 Attucks enrolled 2,394 students, 2,393 Negro and one white.

[68] In a letter to parents in this area, an assistant superintendent justified the boundary change because of "crowded conditions" at school 69.

[69] The first white attended that school in 1967–68, when one white student was enrolled.

VI. BOARD POLICIES SINCE MAY 31, 1968

In May 1968, after the board received notification of the plaintiff's intention to file suit if deficiencies were not corrected,[70] it contracted with Indiana University to study elementary school boundaries "for the purpose of determining the best method of achieving maximum desegregation of all schools * * * under the neighborhood concept."[71] A special study committee of independent consultants was formed, which issued its report in April 1969, making no recommendations for the promotion of integration through boundary changes. The activities of this committee may best be characterized as farcical, since according to the testimony of one of its members, it was not furnished with data as to the racial composition of the students or faculty at any school.

In February 1969, the board requested a study of, and recommendations for, the desegregation of the Indianapolis schools in a letter to the Office of Education, U.S. Department of Health, Education, and Welfare (hereinafter "HEW"). A team of six educators from HEW visited the system for 4 days in March 1969, and prepared a series of recommendations for both the elementary and high schools in the system.[72] These recommendations were presented to the board on April 18, 1969. On June 17, 1969, the board rejected the HEW recommendations, finding that they were not a "satisfactory or workable solution to the integration problem of the schools." [73]

In the same statement rejecting the HEW recommendations, the board called for the appointment of a community-based committee to recommend programs to improve integration, with the first priority directed toward secondary schools.[74] The committee was formed and in October 1969, filed majority and minority reports. The majority recommended the construction of a new Crispus Attucks (presumably, although not explicitly stated, racially desegregated) and also recommended free transfers for high school students regardless of assignment.[75]

Soon after this report, the superintendent established a staff committee to treat the problem of the desegregation of Attucks. This committee recommended the construction of a new Attucks and the phaseout of the present Shortridge and Attucks. The board ultimately rejected the proposed phaseout of Shortridge, but directed the superintendent to search for a site for the new Attucks; no new site has been found.

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[70] This was a "notice letter" under title IV of the Civil Rights Act of 1964; 42 U.S.C. § 2000c-6.

[71] The so-called "neighborhood concept" was not adopted as a formal policy until 1965 and, as has been demonstrated, has proved meaningless in practice. Its principal use is as a slogan for those opposed to busing across racial lines.

[72] Mr. Johnson, the leader of this team, testified that he recognized that time was too limited to draw a comprehensive plan; therefore, the recommendations of the team were threefold: (*a*) to study the possibility of grade reorganization to desegregate the system; (*b*) the submission of a series of specific reorganizations for specific schools to be implemented by September, 1969, as examples of methods of desegregation and as an act of good faith by the Board; and (*c*) general recomendations for the amelioration of segregation at Crispus Attucks.

[73] However, a study of the feasibility of the HEW recommendations undertaken by the board has concluded that, with respect to the elementary schools, all were feasible except for an alternate plan to desegregate school 64 and the plan to desegregate schools 43 and 66.

[74] Specifically, the committee was to recommend solutions to "the problem presented by Crispus Attucks High School as it now exists."

[75] The minority recommended enrichment of the educational program at Attucks and free choice in high school student assignment. The committee submitted no further reports, and did not consider elementary school desegregation.

During the 1970–71 school year, ninth graders assigned to Attucks under a revised feeder system (which desegregated this ninth grade class) attended school at Northwest High School and the Tudor Hall school.[76] Because no site has been found available for a new Attucks, the defendants plan to assign desegregated freshman and sophomore classes to the present Attucks campus in September 1971. Grades 11 and 12 will remain virtually all Negro, and if this grade-a-year plan is continued, Attucks will remain partially segregated until September 1973.

During the 1967–68 school year, the school board decided to establish a middle school (to be known as the Forest Manor Middle School) housing grades 6, 7, and 8 and serving an area comprising the attendance zones of schools 1, 71, and 73, each of which elementary schools was then, and is now, severely overcrowded. The building of the Forest Manor Middle School was not begun in 1968, as planned, but the project has been revived, and the school board is on the point of awarding contracts for the construction of the Forest Manor Middle School. The board's plans for the utilization of this middle school are being reconsidered, because of plaintiff's objections to its proposed use and location. During the 1970–71 school year the percentage of Negro students at schools 1, 71, and 73 was 91.4, 92.6, and 69.6, respectively, and the proposed location of the Forest Manor school is in a predominantly Negro residential area. It is apparent that, as matters stand, the proposed school would tend to perpetuate segregation.

The Board adopted a majority-to-minority transfer provision on June 30, 1970. For the 1970–71 school year approximately 400 high school and 50 elementary school students transferred under this provision, and at the time of trial 300 students had applied for such transfers for the 1971–72 school year.[77]

Since this suit was filed the board has provided various school services on a nondiscriminatory basis.[78] Transfer policies have been administered so as not to increase segregation. A black history curriculum has been developed. Efforts have been made to recruit additional Negro faculty members, and Negro professional employees have been promoted to responsible positions in the central administrative office. A resolution adopted December 8, 1970, commits the board to a program for the integration of administrative staffs (including the coaching staff) in each high school.

In October 1970, the board entered into a contract with the Office of Education, HEW, under which the latter provided funds for it to employ "advisory specialists" to prepare desegregation plans and inservice training programs for the Indianapolis system. Two such advisory specialists were employed,[79] and presented four plans to the board on April 1, 1971. Three of these plans treated only 11 all-black, or virtually all-black schools, while the fourth, and recommended plan desegregated every school in the system. On May 25, 1971, the board rejected all plans, noting that the trial in this cause was to commence July 12, 1971. It thus appears that the board, having taken some steps toward rectifying its previous failure to comply with *Brown II*, is unwilling to proceed further unless directed to do so by the court.

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[76] The Tudor Hall School was purchased by the Board for eventual use as a special education facility. The State superintendent objected to more than 650 students being housed on that site, so part of the Attucks desegregated freshman class was assigned to Northwest High School.

[77] Under this provision, students can transfer from a school in which their race is in a majority to a school in which their race is in a minority. The transfers are contingent, under the terms of the policy, on the availability of space, and no transportation is provided. No transfers are accepted under this provision after school has been in session two weeks in September.

[78] Among these have been special and social services, lunch programs, libraries, and a program to combat dropouts.

VII. External Problems Facing the Board

Despite the fact that the board, through the years, has consistently employed policies and practices causing and maintaining racial segregation in the school system under its control, it is only fair to say that various factors not of its own making have contributed to that result.

A. CHANGES IN RACIAL CHARACTERISTICS OF SCHOOL CITY

The racial characteristics of the School City changed significantly during the period 1954 through 1970. The number of Negroes residing in the School City increased rapidly, both absolutely and proportionately to the entire population of the School City. The number of areas of the School City in which significantly large groups of Negroes resided increased similarly. The pattern of the change in the location of black residential areas was one of expansion from the center of the School City toward its boundaries. While the Negro population was increasing within the School City, the white population within the School City was decreasing rapidly, and, concurrently, the white population in Marion County outside the School City was increasing rapidly.[80]

In 1960, the population of Center Township (all of which, except a small part in Beech Grove, lies within the School City) was 333,351, of which 243,448 (73 percent) were white and 84,439 (26.8 percent) were Negro; in 1970, the population of Center Township had declined to 273,598, of which 166,622 (61.2 percent) were white and 106,112 (38.8 percent) were Negro.

In 1960, the population of Marion County excluding Center Township was 364,216, of which 353,659 (97 percent) were white and 10,473 (2.9 percent) were Negro. In 1970, the population of Marion County excluding Center Township was 518,701, of which 488,538 (94 percent) were white and 28,342 (5.4 percent) were Negro. The data also show that, whereas 59 percent of the white population of Marion County lived outside Center Township in 1960, about 74.5 percent of that group lived outside Center Township in 1970.

The areas of the School City in which the change in racial composition has been significant in the last 10-year period include:

1. An area bounded, generally, by 38th Street on the north, Arlington Avenue on the east, 21st Street on the south, and Boule-

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[79] Both of these specialists were already employees of the Indiapolis system: one was a former principal and consultant, while the other was a former teacher and had held an administrative position in the central office.

[80] As found in sec. III-C, pp. 13-17, supra, discrimination against Negroes in the matter of housing, enforced or condoned by the city and State has been a major factor in confining the Negro to a compact, central area.

vard Place on the west. The eastern part of this area is often referred to as "the Forest Manor area." The change in the racial composition throughout the area is reflected in the changes in the racial composition of several of the elementary schools which serve the area, which changes are shown in the table below:

	Negro students (percent of total) in 1960-1961	Negro students (percent of total) in 1970-1971
School No.:		
1	0. 16	91. 4
11	0	32. 5
51	5. 09	78. 7
53	. 21	32. 6
60	44. 55	99. 6
66	. 44	86. 1
69	31. 31	98. 5
71	2. 92	92. 5
73	10. 73	69. 6
76	53. 61	99. 0
83	(1)	41. 7
99	0	29. 3
110	(1)	98. 4

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[1] Not open.

2. An area bounded on the north by 63d Street (Broad Ripple Avenue), on the east by the tracks of the Monon Railroad, on the south by 38th Street, and on the west by the Indianapolis Water Co. canal, where similar changes are shown in the table below:

	Negro students (percent of total) in 1960-1961	Negro students (percent of total) in 1970-197
School No.:		
55	0. 0	8. 5
66	. 44	86. 1
70	0	28. 1
84	0	2. 2
86	12. 36	53. 5

3. Scattered areas, in each of which the population shift is reflected by a similar sharp change in the racial composition of elementary school population, which changes are shown in the table below:

	Negro students (percent of total) in 1960-1961	Negro students (percent of total) in 1970-1971
School No.:		
27	45. 20	87. 3
38	38. 63	91. 90
45	28. 19	98. 00
75	24. 82	77. 50

At the beginning of the 1970–71 school year, the number of students enrolled in the elementary schools was 79,587, excluding students enrolled in the special education schools. During the 1970–71 school year, that total enrollment was reduced to 77,658; the difference of 1,929 between the October and June enrollment totals is the net result of a departure of 2,122 white students from the elementary schools and an inflow of 193 Negro students to the elementary schools. Of the 110 elementary schools, 13 showed gains, and 81 showed losses, in the number of white students enrolled during the 1970–71 school year.

B. LOW-RENT HOUSING PROJECTS

Low-rent housing projects within the school city have significantly affected the racial composition of the schools. A project typical of this kind is constructed at the periphery of an established Negro residential area and, for that reason among others, attracts a Negro occupancy, which is eventually reflected in the racial composition of the school that serves the area in which the project is situated.

Such an effect is to be seen in several elementary schools, including: School 67, in which Negroes constituted 4 percent of the student body in 1968–69 and 30.9 percent in 1970–71, owing to the opening of Eagle Creek Village at Tibbs Avenue and Cossell Road; school 112, in which Negroes constituted 13.7 percent of the student body in 1968–69 and 42.9 percent in 1970–71, owing to the opening of Raymond Villa, at Raymond Avenue and Perkins Street; school 71, in which Negroes constituted 10.8 percent of the student body in 1965–66 and 92.6 percent in 1970–71, owing to the opening of Hawthorne Place at 32d Street and Emerson Avenue; and school 99, in which there were no Negro students in 1968–69 and in which Negroes constituted 33.9 percent of the student body at the end of the 1970–71 school year, owing to the opening of Beechwood Gardens at 30th Street and Graham Avenue.

Housing projects of the kind just described not only have racial consequences for the schools; each of them tends to represent, as well, a demand for a significant amount of school space. Eagle Creek Village, Raymond Villa, and Beechwood Gardens necessitated additions to schools 67, 112, and 99, respectively, each of which cost about $1,300,000. Salem Village, at 30th Street and Baltimore Avenue, necessitated the construction of a complete school (school 110), which has served a virtually all-black student body since it was opened in 1966.[81]

C. NONCOOPERATION OF LOCAL OFFICIALS

Some of the reasons why no new site for Attucks has been acquired are directly attributable to action or inaction on the part of certain agencies of the civil government of the city of Indianapolis. One possible site is a 54-acre, undeveloped tract at the southwest corner of the intersection of 38th Street and White River. Although a part of the land is low, there is more than adequate high ground for buildings, and the low ground is protected by a levee. This tract is owned by the city of Indianapolis, which could presumably make it available to the school city free under Indiana law,[82] or in any event make the transfer for a nominal price.[83] However, the city has declined to consider parting with the 54 acres, on the ground that it is needed for use as a nursery for the department of parks and recreation. The city's sense of priorities strikes the court as curious.[84]

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[81] The plaintiff United States of America, which of course sponsors federally supported housing projects, has suggested a finding that the locations of six of the 10 projects opened in the school city since 1965 have tended to promote integration in those instances. There is insufficient evidence to support such a finding.

Another likely site for the new Attucks was determined to be a tract at 30th Street and Guion Road, and the board acquired an option to purchase the tract. It then filed an application to have the land rezoned for school use, only to have its application denied by the Metropolitan Development Commission of Marion County, which asserts the right to control the use of all land in the county, including that proposed to be dedicated for public purposes.

D. LEGISLATIVE ACTION SINCE 1949

As noted briefly above, the State's long-time policy of *de jure* segregation ostensibly ended in 1949 with the passage of chapter 186 of the acts of that year.[85] The new policy of the State, as set out in the first section of the act, was stated to be as follows:

> It is hereby declared to be the public policy of the State of Indiana to provide, furnish, and make available equal, nonsegregated, nondiscriminatory educational opportunities and facilities for all regardless of race, creed, national origin, color or sex; to provide and furnish public schools and common schools equally open to all and prohibited and denied to none because of race, creed, color, or national origin; to reaffirm the principles of our Bill of Rights, civil rights and our Constitution and to provide for the State of Indiana and its citizens a uniform democratic system of common and public school education; and to abolish, eliminate and prohibit segregated and separate schools or school districts on the basis of race, creed or color; and to eliminate and prohibit segregation, separation and discrimination on the basis of race, color or creed in the public kindergartens, common schools, public schools, colleges and universities of the State.

Note that the State completely anticipated and completely adopted the holding in *Brown I* by a full 5 years. Because of *Brown I*, moreover, it is impossible for the State legally to change its professed policy, because that policy has now assumed the stature of a constitutional imperative, far above the power of the State to detract therefrom. With these principles in mind, the Court examines certain post-1949 legislation enacted by the general assembly.

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[82] See acts 1957, Ch. 229, p. 501, as amended; Burns Ind. Stat. Ann. §§ 53-403, 55-404.

[83] The Court estimates that the cost of a school site in an appropriate location, if purchased on the open market, would run from at least $12,500 to $17,000 per acre.

[84] In addition to the fact that use of the White River tract as a nursery does not appear to be its highest and best use, it is also instructive to note that the Department has available for nursery purposes various parts of the 2,650 acre nonreservoir portion of its virtually undeveloped Eagle Creek Park. Note also that approximately half of the 54 acres would meet State per-pupil minimum land requirements (Footnote 60, *supra*), leaving the balance available for planting to trees and shrubs.

[85] Note 50, *supra*.

Historically, it was well established by the common law of the State that whenever an incorporated city or town expanded its corporate limits, the school city or town succeeded to the powers and duties of the township trustee with respect to the administration of the public schools. In other words, the boundaries of a school city and of a civil city were coterminous.[86] This rule was recognized in a 1931 act, pertaining to the defendant school board, as follows: "In each civil city of this State having . . . more than 300,000 inhabitants there shall be a common school corporation hereinafter called the school city whose duties and powers shall be coextensive with the corporate boundaries of such civil city . . ." [87] When such act was amended in 1955 in order to increase the size of the board, among other things, such provision remained unchanged.[88]

However, in 1961 the General Assembly crippled this policy by an act which provided that, with respect only to Marion County, the extension of the boundaries of a civil city by a civil annexation would work only a prima facie extension of the boundaries of the school city, and render such school city extension subject to a separate remonstrance by the losing school corporation.[89] Thus, for the first time, it became possible for the school city of Indianapolis, alone among the major school cities of the State, to have jurisdiction over a lesser territorial area than the corresponding civil city.

Even more grave in import are chapters 52 and 173 of the acts of the 1969 general assembly. Section 3 of chapter 52 amended chapter 186 of the acts of 1961 to abolish the concept that the school and civil cities in counties having a city of the first class [90] would have coterminous boundaries, and limited the school city of Indianapolis to enlarging its territory by one of the two methods authorized in the 1961 act in addition to automatic prima facie extension on enlargement of the civil city: (1) by agreement with the school corporation losing territory, or (2) by unilateral annexation by the school city of all or part of the territory of another school corporation.[91] Both procedures are subject to remonstrance. Further, said section repealed section 9 of chapter 186 of the acts of 1961 as to all enlargements of the school city claimed to have been made pursuant to civil city annexations and not yet finally effective. That is, in cases where remonstrances and/or court actions were pending against school city annexations pursuant to section 9 of the 1961 act, the annexations were simply canceled by legislative fiat.

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[86] *Board of School Com'rs* v. *Center Twp.*, 1896, 143 Ind. 391, 42 N.E. 808; *School Twp. of Allen* v. *School Town of Macy*. 1887, 109 Ind. 559, 10 N.E. 578; *School Town of Leesburg* v. *Plain School Twp.*, 1877 86 Ind. 582; *State* v. *Shields*, 1877, 56 Ind. 521; *Carson* v. *State*, 1867, 27 Ind. 465.

[87] Acts 1931, Ch. 94, § 1, p. 291; Burns Ind. Stat. Ann. § 28–2301 (1948 Repl.).

[88] Acts 1955, Ch. 123, § 1, p. 291; Burns Ind. Stat. Ann. § 28–2301 (1968 Cum. Supp.).

[89] Acts 1961, ch. 186, §§ 1, 9, 10; Burns Ind. Stat. Ann. §§ 28–2338, 28–2346, 28–2347 (1968 Cum. Supp.).

[90] Indianapolis is the only city of the 1st class in Indiana.

[91] Acts 1969, ch. 52, § 3, p. 57; Burns Ind. Stat. Ann. § 28–2346a (1970 Cum. Supp.).

Chapter 173 [92] is formally titled the "Consolidated First Class Cities and Counties Act," and is hereafter referred to by its more familiar name, "Uni-Gov." This act purports, in general, to consolidate the civil governments of the former city of Indianapolis and of Marion County into a unified, metropolitan city government, with certain exceptions,[93] which expanded or consolidated city continues to be known as the city of Indianapolis.

The Uni-Gov Act provides expressly that "any school corporation, all or a part of the territory of which is in the consolidated city or county" shall not be affected by the act.[94] Thus Uni-Gov leaves the defendant school city exactly where it found it: confined to an area in the central part of the consolidated city of Indianapolis, where it is surrounded by eight township school systems operating independently within the purportedly unified city, and by two additional independent school corporations operated by Beech Grove and Speedway City (hereinafter, in the aggregate, "outside school corporations"). For the 1969–70 school year these outside school corporations together had 73,205 student enrolled, of whom 2.62 percent were Negro, and together employed 3,037 teachers, of whom 15, or 0.49 percent were Negro.

The outside school corporations compete effectively with the school board for teachers. Since the filing of this action, some white teachers employed by the board and requested to transfer to integrated schools have declined transfer and found havens in the outside schools. The outside schools have likewise contributed to the exodus of white students from the school city by accepting them for transfer, on payment of tuition.

Considering the history of segregation of the Negro in Indiana and in Indianapolis, the racial complexion of the outside school corporations and of the adjoining counties in the Indianapolis metropolitan area, the ongoing flight to the suburbs by the white population of the school city, and the various other factors above set out, the effect of the 1961 and 1969 acts of the general assembly referred to in this section may well have been to retard desegregation and to promote segregation. In other words, under previous Indiana law, which still applies to all cities except Indianapolis, civil annexation would automatically carry school annexation with it, and the chances of successful remonstrance against logical annexation by an expanding municipality, carrying with it the usual municipal services, would be virtually nil. Under the present law, if valid, the ability of the board to expand its jurisdiction coterminous with the consolidated city, or for that matter to expand it at all, is likewise virtually nil, as a practical matter.

E. THE TRIPPING FACTOR

The undisputed evidence in this case, agreed to by plaintiff's expert from the Office of Education, is that when the percentage of Negro pupils in a given school approaches 40, more or less, the white exodus becomes accelerated and irreversible. Therefore, resegregation rapidly occurs, and the entire central core of the involved city develops into a virtually all-Negro city within a city when, as in Indianapolis, the Negro residential area is largely confined to a portion of the central city in the first place.

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[92] Acts 1969, ch. 173, p. 357; Burns Ind. Stat. Ann. §§ 48–9101—48–9507 (1970 Cum. Supp.).

[93] The cities of Beech Grove and Lawrence ("excluded cities") and the incorporated town of Speedway City ("excluded town") are permitted to carry on as separate municipal corporations within the territory of the consolidated city, but the voters of these communities are entitled to vote for candidates for the offices of mayor and city-county councilman of the consolidated city, as well as for the corresponding officials of their respective excluded city or town.

[94] Acts 1969, ch. 173, § 314, p. 357; Burns Ind. Stat. Ann. § 48–9213 (1970 Cum. Supp.).

During the trial, this court repeatedly attempted to cause the plaintiff United States of America to produce statistics from HEW showing comparative racial statistics for the school systems of the larger school cities of the Nation before and after active desegregation efforts were commenced. The court was advised that no such statistics were available, incomprehensible as that might seem considering that such Department is the Federal agency directly concerned with the problem.

However, according to HEW's news release of June 18, 1971, in evidence, the percentage of Negro students in certain public school systems as of fall, 1970, was as follows (in order according to total pupils in system): New York, 34.5; Chicago, 54.8; Detroit, 63.8; Philadelphia, 60.5; Houston, 35.6; Baltimore City, Md., 67.1; Cleveland, 57.6; Washington, D.C., 94.6; Memphis, 51.5; St. Louis, 65.6; Orleans Parish (New Orleans), La., 69.5; Atlanta, 68.7; Birmingham, 54.6; Caddo Parish (Shreveport), La., 49.0; Louisville, 48.3; Richmond, Va., 64.2; Gary, 64.7; and Compton, Calif., 83.0. In some of these cities an additional sizable percentage of the student population belongs to another minority group which historically has been, and still is subject to racial discrimination: those with Spanish surnames, presumably of Mexican or Puerto Rican descent. When these percentages are added, the total minority race percentage of pupils in such cities is as follows: New York, 60.2; Chicago, 64.6; Houston, 50.0; and Compton, Calif., 94.4. All of these school cities, as well as others which could be named,[16] appear to be completely beyond hope of meaningful desegregation, absent some dramatic change in their boundaries. In the absence of HEW statistics to the contrary, the court infers that desegregation efforts have had much to do with the current figures as above quoted.

The brutal truth as to what may happen when a court and a school board undertake in good faith to apply across-the-board desegregation in situations when racial balances reach the tipping point is well illustrated in the rather poignant opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, —— F.Supp. ——, handed down on July 28, 1971. Pointing out that Atlanta in 1961–62 was one of the first major southern cities officially abandoning the dual school system, it noted that in the 10-year interim the balance has shifted from 70- to 30-percent white to 70- to 30-percent Negro, and that the remaining 30-percent whites were themselves confined to two areas. The court declined to order further enforced measures, as being futile.

VIII. Conclusions of Law

1. This court has jurisdiction of the parties and the subject matter of this action under section 407 of the Civil Rights Act of 1964 (42 U.S.C. § 2000c–6) and under 28 U.S.C. § 1345.

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[16] Strangely, the HEW release failed to list Newark, N.J., where the combined minority percentage is known to be at least 70.

2. Pursuant to the 14th amendment and title IV of the Civil Rights Act of 1964 this court has jurisdiction to hear and to decide all issues concerning alleged racial discrimination in public education in the Indianapolis school system, including the defendant board's policies with respect to assignment and transfer of students, the allocation of faculty and staff, the location and construction of schools, the transportation of students, and the general educational structure and process. *United States* v. *School District 151*, N.D. Ill., 1968, 286 F. Supp. 786, aff'd 7 Cir., 1968, 404 F. 2d 1125.

3. The court having found for the plaintiff that the defendant school board was on May 17, 1954, May 31, 1968, and as of the date of trial operating a segregated school system wherein segregation was imposed and enforced by operation of law, the law is with the plaintiff. Therefore, the board is "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination (will) be eliminated root and branch." *Brown* v. *Board of Education* (*Brown II*), 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083; *Green* v. *County School Board*, 1968 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed. 2d 716.

4. All provisions of Federal, State, or local law requiring or permitting racial discrimination in public education must yield to the principle that such discrimination is unconstitutional; revisions of local laws and regulatons and revision of school districts may be necessary to solve the problem. *Brown II.*

5. This court has continuing jurisdiction to make and enforce such decrees in equity as are necessary to accomplish the above-mentioned objective. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.* ("*Swann*"), 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed. 2d 554.

IX. Further Parties and Proceedings

As noted herein, the percentage of Negro elementary pupils within the school city had reached 37.4 as of the past school year, and was slowly rising. Fortunately, the change has not yet become a rout, and the court recognizes that a substantial part of the increase during the past 15 years has been caused by immigration from the Southern States, which has virtually ceased. The court is further of the opinion that the white citizens of this community are less likely than those of certain of the cities listed in part VII hereof to succumb to the enslavement of unreasoning racial fears, and recognizes that there are many good reasons for moving to the suburbs which have nothing to do with this case.

Nevertheless, it is obvious that something more than a routine, computerized approach to the problem of desegregation is required of this court, lest the tipping point be reached and passed beyond retrieve.[96]

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[96] The plight of the Negro citizen, still striving for equality 352 years after Jamestown, recalls the familiar words of the Red Queen to Alice: "Now here, you see, it takes all the running you can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that." L. Carroll, Through the Looking-Glass.

This is particularly true in the light of the dictum in *Swann* to the effect that "neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." Put another way, the easy way out for this court and for the board would be to order a massive "fruit basket" scrambling of students within the school city during the coming school year, to achieve exact racial balancing, and then to go on to other things. The power to do so is undoubted. There is just one thing wrong with this simplistic solution: In the long haul, it won't work.

With due regard for the opinions of the many other courts which have grappled with the problems here involved, and with full knowledge of the countless hours of research, heartache, and soul searching which have doubtless gone into them, this Court is compelled to say that the common characteristic of most of them is tunnel vision. In interpreting the mandate of Green "to come forward with a plan that promises, realistically, to work, and promises, realistically, to work now," they have tended to stress the same word stressed by the Supreme Court, and in doing so have focused exclusively on the school board defendant. If the school system involved is already at or near the tipping point, nothing is accomplished save the unfortunate results noted above in various of our major cities. As to the Green command, this court prefers to stress its major thrust: Promises realistically to work. (This court's emphasis.)

Realistically, it is clear that the tipping point/resegregation problem would pale into insignificance if the Board's jurisdiction were coterminous with that of Uni-Gov. It would be minimized still further if extended to Lawrence, Beach Grove, and Speedway City, and to certain parts of the adjoining counties practically indistinguishable from the city of Indianapolis, such as the Carmel area of Hamilton County and the Greenwood area of Johnson County. Certain legal questions immediately spring to mind which cannot, or at least should not be answered without the joinder of additional parties to this action.

Some of these questions are as follows:

1. Are chapter 186 of the acts of 1961, chapter 52 of the acts of 1969, and chapter 173 of the acts of 1969, or any of them, unconstitutional as tending to cause segregation or to inhibit desegregation of the Indianapolis School System?

2. If the answer to question 1 is in the affirmative, did passage of the Uni-Gov Act automatically extend the boundaries of the school city coterminous with the boundaries of the civil city, as provided generally by Indiana law?

3. If both of the foregoing questions are answered in the affirmative, are Lawrence, Beech Grove, and Speedway City presently under the jurisdiction of the defendant board, or does Uni-Gov merely have the effect of annexing the eight township school corporations?

4. Regardless of the answer to the first three questions, should the general assembly, by appropriate legislation, provide for the creation of a metropolitan school district embracing all of Marion County, together with all or some substantial part of the other

counties going to comprise the Indianapolis Metropolitan Statistical Area, in order to purge the State of its role in contributing to de jure segregation in the Indianapolis School System? [97]

5. If the answer to question 4 is in the affirmative, and the general assembly fails to act within a reasonable time, or in a reasonable way, does this court have the power to create such a metropolitan school district by judicial decree? [98]

Other questions likewise require an answer:

6. Does the Metropolitan Development Commission of Marion County have the power to deny the school board its choice of sites for Crispus Attucks or other new schools? Put another way, does this court have the power to override such commission if it finds that its rulings interfere with desegregation?

7. Does this court have the power to override rulings of the said development commission or of any other involved agencies with regard to the location of low-rent housing projects, if it finds that the locations of such projects interfere with desegregation, or tend to cause desegregation?

The plaintiff is ordered to proceed forthwith to prepare and file appropriate pleadings to secure the joinder herein as parties defendant of the necessary municipal corporations and school corporations which would have an interest in questions 1–5, inclusive, and to seek such relief as to the plaintiff seems justified. The defendant is ordered to proceed similarly as to those agencies which would appear to have an interest in questions 6 and 7, joining them as third party defendants. Because of the interest of the State of Indiana in the constitutionality of its laws, its attorney general should also be served by the plaintiff.

Nothing herein should be construed as limiting the parties to consideration of the seven questions above suggested. Other questions may well occur to them which would involve additional parties, and if so they should feel free to proceed accordingly and to seek whatever relief seems appropriate.

Further, it may be that the opinions herein expressed, the questions herein propounded, and the orders herein made will cause individuals or bodies politic to desire to intervene herein. Petitions for intervention will be given careful consideration.

X. ORDER OF THE COURT

Finally, what is to be done pending decision of the questions above set out? The order of the Court in this regard is as follows:

It is hereby ordered that the defendants, their successors in office, officers, agents, employees and all those in active concert or participation with them, are permanently enjoined from discriminating on the basis of race in the operation of the Indianapolis School System.

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[97] The State has the undoubted power to abolish, consolidate, eliminate, or create new governmental corporations. *Woerner* v. *City of Indianapolis*, 1961, 242 Ind. 253, 177 N.E. 2d 34.

[98] Is there, for example, an analogy between the power of the court in desegregation cases, and the power of the court in cases involving legislative or congressional redistricting, both of which arise out of the equal protection clause of the 14th amendment? cf. *Baker* v. *Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663; *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 2d 506.

It is further ordered that the defendants take, at a minimum, the following specified actions to fulfill their affirmative duty to achieve a nondiscriminatory school system:

1. Immediately take steps to assign faculty and staff so that no school is racially identifiable from the racial composition of its faculty or staff. Mandatory assignments or reassignments are to be made if necessary, and the assignments to achieve full desegregation will be made prior to or with the opening of schools in September 1971. This Court further notes that the evidence adduced in this cause shows that, in faculty and staff reassignment heretofore effected, these reassignments have tended to result in more experienced Negro faculty and staff being transferred and/or assigned to schools attended predominantly by white students and more inexperienced white faculty and staff being transferred and/or assigned to schools attended predominantly by Negro students. Defendants should, accordingly, redress or tend to redress this situation in making whatever assignments or reassignments that are necessary to comply with this order.
2. Immediately continue with their plans to desegregate and relocate Crispus Attucks High School.
3. Immediately amend the "majority-to-minority" transfer policy to conform to the requirements enunciated by the Supreme Court in *Swann*, so that such transfers are not to be dependent upon availability of space in the receiving school and so that transportation will be provided, upon request, to students making such transfers. Provided, however, that the board may request authority to designate the transferee school or schools in the event that extreme diffusion of requests presents practical problems of transportation, or in the event that extreme concentration of requests threatens the racial stability of a given school, that is, the tipping point factor.
4. Immediately give all possible publicity to students and parents of students who may be eligible for transfer under (3), regarding the new policy.
5. Immediately attempt to negotiate with the outside school corporations for possible transfer of minority race students to such outside schools, including high schools, for the coming school year.[99]
6. Immediately resurvey the probable racial make-up of all schools for the 1971–72 school year, and take appropriate action to prevent schools, including high schools, now having a reasonable white-black ratio from reaching the tipping point. Transportation of students into or out of such schools shall be resorted to as required.[100]

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[99] If the outside school corporations have the capacity to accept transfer of white students, they have the capacity to accept minority race students. Further, the board has available many portable classrooms and could, with a little imagination, "lend-lease" teachers, if necessary.

[100] This Court regards the outcry made in some quarters against "busing" as ridiculous, in this age of the automobile. Most students in the outside school corporations have been bussed for years, with never a complaint against busing per se. Students required to be bused could be required to walk to their former schools for ease of pickup and speed in delivery.

7. Immediately cease and desist from going forward with construction of the Forest Manor School until the Court hears further evidence on this subject.

It is recognized that the orders thus far made will not result in significant desegregation of majority-black schools immediately, unless the voluntary transfer and outside school corporation transfer policies are unusually successful. It is also recognized that mandatory transfers to maintain stability pursuant to subparagraph (6) may largely involve Negro students, as is certain with regard to transfers to the outside school corporations. Neither of these facts seems "fair" in a theoretical sense, and have caused the Court a great deal of concern. However, there is a limit to what can be accomplished at one time, and final plans cannot be made until answers are found to the seven legal questions posed. Determination of such questions will be expedited to the utmost degree consistent with due process.

Meanwhile, the defendants are directed to file, on or before September 3, 1971, the plans they propose for the 1971–72 school year pursuant to the within order and on their own initiative, with the usual copies to counsel and amicus curiae, who shall have the right to object thereto and/or to make their own suggestions within 10 days thereafter. Such plans shall include their current proposals regarding the site of and assignment of pupils to the proposed Forest Manor Middle School.

It is finally considered and adjudged that the defendant school board pay the costs of this action.

All of which is considered, ordered and adjudged this 18th day of August, 1971.

S. Hugh Dillin, *Judge.*

BRADLEY *v.* RICHMOND

Civ. Action 3353 (D.C. Va. 1972)

MEMORANDUM

The hearing on the issues currently before the court in this school desegregation case, which has been before the court in one posture or another for many years, encompassed weeks of trial, involving eight separate groups or parties, each represented by a team of lawyers, and included the introduction of more than 325 exhibits.

The primary defendants in the instant issue are members of the Virginia State Board of Education; the State superintendent of public instruction; and the members of the respective school boards and boards of supervisors of Henrico and Chesterfield Counties, both of which adjoin the city of Richmond, Va.; and the school board and city council of the city of Richmond.

The task of complying with the requirements of F.R.C.P. 52 in setting out the court's findings of fact and conclusions of law requires that this memorandum be divided generally into a brief history of the litigation, general findings of fact and conclusions of law, and a section containing precise and specific findings as illustrative instances of the more general findings.

The court has jurisdiction over all necessary parties in this appropriate class action, 28 U.S.C. section 1343 (3) and (4); 42 U.S.C. section 1983; rule 23 (a) and (b)(2) of the Federal Rules of Civil Procedure.

Excerpts from this court's opinion in *Bradley* v. *School Board of City of Richmond*, 317 F. Supp. 555 (1970), establish the present stage of this litigation. At the time, the schools of the city of Richmond were being operated under a freedom of choice plan, and the plan was approved primarily to insure the opening of schools on the then planned date in September 1970.

History of Litigation

[Excerpts from *Bradley*, supra]

"On March 10, 1970, the plaintiffs filed a motion for further relief, based upon the mandates of our appellate courts requiring school boards to put into effect school plans which would promptly and realistically convert public school systems into ones which were unitary, nonracial systems, removing all vestiges of racial segregation."

On March 12, 1970, the court ordered the defendants to ". . . within 10 days from this date, advise the court if it is their position that the public schools of the city of Richmond, Va., are being operated in accordance with the constitutional requirements to operate unitary schools as enunciated by the U.S. Supreme Court."

On March 19, 1970, defendants filed a statement to the effect that "they had been advised that the public schools of the city of Richmond are not being operated as unitary schools in accordance with the most recent enunciations of the Supreme Court of the United States," and further that they had "requested the Department of Health, Education, and Welfare to make a study and recommendation as to a plan which would insure the operation of a unitary school system in compliance with decisions of the U.S. Supreme Court," said plan to be ready by May 1, 1970.

A pretrial conference was held in open court on March 31, 1970, at which time the court having some doubt as to the effect or intent of the defendants' statement of March 19, 1970, "that they had been advised that the public schools of the city of Richmond are not being operated as unitary schools in accordance with the most recent enunciations of the Supreme Court of the United States," inquired as to whether defendants were desirous of an evidentiary hearing as to the plan they were then operating under, that is, freedom of choice.

The defendant school board, by counsel, advised the court that such a hearing would not be necessary and admitted that their freedom of choice plan, although operating in accord with this court's order of March 30, 1966, was operating in a manner contrary to constitutional requirements.

As a consequence thereof, the court on April 1, 1970, entered a formal order vacating its previous order of March 30, 1966, and mandatorily enjoining the defendants to disestablish the existing dual system of schools and to replace same with a unitary system, the components of which are not identifiable as either "white" or "Negro" schools.

The defendant school board was directed to file its proposed plan by May 11, 1970. Plaintiffs were to file exceptions by June 8, 1970, and hearings were set for June 19, 1970.

The court heard and considered motions to intervene and permitted all who so moved to intervene, pursuant to Fed. Rules Civ. Proc. Rule 24(b), 28 U.S.C.

Exceptions to the HEW plan were filed by the plaintiffs and those intervenors described as Northside residents.

The hearing on all proposed plans and exceptions thereto was commenced on June 19, 1970, and concluded on June 26, 1970, at which time the court, recognizing the necessity for expeditious rulings and intending to file these more detailed findings of fact and conclusions of law, advised the defendant school board that its proposed HEW plan was not acceptable—a conclusion which the court felt then and still feels should have been patently obvious in view of the opinion of the U.S. Court of Appeals for the Fourth Circuit in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 431 F. 2d (4th Cir. 1970), which had been rendered on May 26, 1970.

Student Population by Race Under Freedom of Choice in Effect 1969–70

As of May 1, 1970, the Richmond public school system enrolled approximately 52,000 students. The racial composition of the school student population was roughly 60 percent black and 40 percent white. The board operated 61 school facilities.

HIGH SCHOOLS

Of the seven high schools, three were 100 percent black; one was 99.26 percent white; one was 92 percent white; one 81 percent white and one 68 percent black, the latter being John Marshall located on the Northside of the city.

MIDDLE SCHOOLS

Of the middle schools, three were over 99.91 percent black (99.92 percent, 100 percent, 100 percent); one was 88 percent black; one 73 percent black; three were over 91 percent white (91 percent, 97 percent, 98 percent), and one was 69 percent black.

ELEMENTARY SCHOOLS

Seventeen elementary schools were 100 percent black; four others were in excess of 99.29 percent black; one was 78 percent black; one was 37 percent black; and another was 30 percent black.

Two schools were 100 percent white; 13 others were 90 percent or better white; two others were 86 percent or better white; five others were between 53 and 70 percent white.

As to the 12 schools with special programs, two were 100 percent black; one was 92 percent black; one was 83 percent black; two others 69 percent or better black; four schools had white students ranging from 78 to 100 percent; two others were 53 percent or better white.

FACULTY AND STAFF

Out of a total faculty and staff of 2,501, excluding special program schools,

4 had 100 percent white faculty and staff;
13 had 100 percent black faculty and staff;
16 others had 90 percent or better white faculty and staff;
12 others had 90 percent or better black faculty and staff;
8 others had 80 percent or better white faculty and staff;
4 others had 80 percent or better black faculty and staff.

FACULTY AND STAFF BY AREA

East end side of city	92.2 percent black—	7.8 percent white
Southside area	30.0 percent black—	70.0 percent white
Annexed area	2.5 percent black—	97.5 percent white
West end—Northside	50.6 percent black—	49.4 percent white

There is little doubt that under freedom of choice Richmond public schools had not achieved a unitary system as required by law—see *Green* v. *County School Board of New Kent, supra.* In 1965 the defendant school board was directed to desegregate the faculties and staffs of the public schools, *Bradley* v. *School Board of City of Richmond*, 382 U.S. 103, 86 S. Ct. 224, 15 L. Ed. 2d 187 (1965); yet out of a total of 658 faculty and staff members in the east end area schools, 607 were black and 51 white; in the southside area schools, 108 were black and 252 were white; in the west end-northside area schools, 459 were black and 448 were white (even there the assignment of faculty and staff was such as to create in the separate schools disparities ranging from 57.1 percent white and 42.9 percent black in one school to other schools in which there were either 100 percent black or 100 percent white).

That the respective Richmond public schools with rare exception, were as to student population and staff readily identifiable as either black or white schools is too obvious to warrant any further discussion. The defendant school board's admission in this regard was well warranted, and the court so finds.

DE JURE SEGREGATION

The city of Richmond's present pattern of residential housing contains well-defined black and white areas, which undoubtedly is a reflection of past racial discrimination contributed in part by local, State, and Federal Government.

The city of Richmond has itself described the residential pattern of development as being one in which there has been "a total isolation and segregation of the Negro."

Schools have been built on land in which the deeds contain restrictive covenants precluding the use of property by any other than those of the Caucasian race.

Seven years after the *Brown* decision the officials of the city, the school board and the Richmond Redevelopment and Housing Authority were describing schools as black or white.

Urban renewal sites have generally been selected in well defined Negro residential areas; urban renewal is to a great extent sponsored by agencies of the Federal Government. Local housing authorities or urban renewal authorities such as the Richmond Redevelopment Authority present their proposals to the U.S. Department of Housing and Urban Development, who in turn review the proposals to ascertain whether they meet Federal criteria for funding purposes.

Prior to 1964 public housing projects were built in consideration of racial character and the ultimate uses thereof. They were built for either black or white occupany. In Richmond they have been established according to racial identity. Between the passage of title VI of the 1964 Civil Rights Act and 1967, tenants' selection policy could be generally characterized as a freedom of choice, and there was little change in racial character of occupany of public housing projects.

There is a direct relationship between the selection of sites for public housing projects and the selection of sites for public schools.

Racially segregated housing patterns have resulted to a great extent in limiting options available to black persons to occupy such housing.

The blacks have generally been "locked in" so to speak, by the additional factor that for a substantial portion of the time in which Federal Housing Administration operated separately from the Department of Housing and Urban Development, of which it is now a part, its policy was to refuse to insure home loans in those areas which were not racially homogeneous.

Statutes such as we had in Virginia (and in other states, many outside the South), which required racial segregation in housing and schools, as well as restrictive covenants limiting the use and occupancy of land dwellings to members of the Caucasian race, have long term effects which are not and have not diminished by the lifting of such restrictions. Indeed, even now, some 22 years after the outlawing of restrictive covenants, and years after the outlawing of discriminatory statutes and ordinances in Virginia, the facts are that there are only a few areas in the city of Richmond which are considered ones of a transitional nature.

That private discriminatory actions have made their contribution to the racially segregated housing patterns in Richmond is evidenced by the fact that most subdivision deeds in the area contain racially restrictive covenants. Only 4 years ago the city purchased land for use by the school board the deed to which contained a racially restrictive covenant. Racially restrictive covenants were included by Lawyers Title Co. in abstracts in the city right up to 1969.

The city of Richmond has always permitted higher population densities in black areas than in its white areas.

Knowledgeable people in the field of real estate are reasonably certain, or as expressed by one expert in the field "could probably guess, with good certainty, the racial acceptability, if you want to use that word, from almost any ad in the paper." As late as June 23, 1970, there were ads in the local newspapers stating at least two properties were available for sale to "anyone."

While the requirements for membership in the Richmond Board of Realtors, a private group of real estate brokers, have no relation to race, there has been and still may be, according to uncontradicted testimony, a clause in the code of ethics of the realtors to the effect that one could not disturb the white community by selling property therein to blacks, although certain areas of the city would be offered to nonwhites by all realtors once the board of realtors determined that an area was one of transition and a home had been sold to blacks in a particular block, and that block was determined by the board to have been "broken."

Defendants' exhibit 18 graphically shows that black areas are generally in the inner city and transition areas are without exception immediately contiguous to the already existing black areas.

The combination of public and private discrimination which has been inflicted upon the Negroes is perhaps best described in the model neighborhood planning grant application made by the city of Richmond to the Department of Housing and Urban Development as recently as 2 years ago. In describing the virtually all Negro population of the area for which the application was made the city stated, "The racial profile of the model neighborhood does not provide an ethnic mix which is representative of total city population, but reflects the total isolation and segregation of the Negro within the city's residential pattern of development;" and later in the same application the city stated, "Community neglect of education is illustrated by the fact that only two of the eight schools in the model neighborhood area are less than 10 years old, the other six are over 30 years old;" and still further, "Children do not read and spell correctly. Dropout rate in the schools is too high. Children are not able to speak correctly. Racial discrimination and segregation is visible."

In the same application in reference to housing the city stated, "Availability of housing is limited because of the pattern of racial segregation in the community;" and still further, "Many Negroes with the ability to pay for better housing are confined . . . by social constraints;" and "Housing available to Negroes in Richmond is limited as in most major U.S. cities by racial discrimination in the sale and rental of housing;" and "Discrimination tends to polarize the Negro population into confined areas . . ." The same application stated, "As a rule, the Negro schools are older and occupy smaller sites than the white schools."

HEW Plan

Pursuant to this court's order of April 1, 1970, directed to the defendant school board, to create a unitary system of schools, the board for all practical purposes referred the matter to the Division of Equal Educational Opportunities, associated with the U.S. Office of Education, Department of Health, Education, and Welfare.

A team from that division, headed by a program officer, commenced the preparation of a plan for the operation of the public schools of Richmond and presented their suggested plan to the school board on April 30, 1970. The board approved the plan as submitted, with a minor change concerning the incoming senior classes of the respective high schools in the system, and a change as to suggested faculty assignment. The board's plan did not, as suggested by HEW, propose to assign teachers and staff so as to approximate, at each facility, the ratio of black to white teachers in the system as a whole. The board amended that portion of the HEW plan to provide that assignments of teaching and other personnel would be made so as to provide "substantial integration of same," which was interpreted by the board to mean a 20-percent variance on either side of the actual systemwide ratio.

The HEW team secured information from the school administration as to building capacities, enrollments, condition of the school buildings, acreage of the building playgrounds, and so forth. Each school in the system was visited by groups of two members of the team. Interestingly enough, no detailed transportation information was requested by the team of the school administration, nor was any furnished to them. The evidence disclosed that the HEW team never conferred with the school board. Although it was aware that some limited bus transportation was provided by the school board, and that there was an existing public transportation network, no consideration was given to same by HEW by reason of the fact that by unwritten HEW policy, which apparently was then in effect, transportation resources which could be utilized by a school board were not to be considered and, obviously, since no detailed transportation information was requested or furnished to the HEW people, none was considered.

While the HEW team presumably drafted a plan to desegregate the existing dual system and to provide for a unitary school system with "as much integration, desegregation as possible," to quote the witness who testified that he was in charge of the development of the plan, amazingly enough no consideration was given as to the race of the children whom they sought to assign to the school facilities.

The HEW plan was basically a zoning plan, with some clustering of schools. In setting the zones for the various schools, the drafters of the plan considered the capacity of the school buildings, the proximity of the buildings to the pupil population, and factors such as the safety hazards on the immediate approaches to the schools in relation to where the pupils lived. The plan was, in essence, a neighborhood school plan—

a plan which under certain circumstances undoubtedly would be commendable. By reason of the residential patterns in the city of Richmond, however, wherein there are with rare exceptions distinct white areas and distinct black areas, a true neighborhood school plan of necessity can result only in a system in which there are black schools and white schools and not just schools.

As the Court has already stated and found as a fact, Negroes in Richmond live where they do because they have no choice. Housing is generally not available in other areas of the city.

In the east end of the city, schools therein would be composed of the following:

4 schools would be 100 percent black
9 schools would be between 93 and 99.65 percent black
1 school would be 88 percent black
1 school would be 68 percent black
1 school would be 64 percent black

Included in the 16 schools aforementioned are two high schools, one of which would have a 96 percent black student population and the other 88 percent black student population.

In the Southside area of the city the percentages would be as follows:

1 school would be 58 percent white
1 school would be 59 percent white
1 school would be 72 percent white
1 school would be 74 percent white
1 school would be 84 percent white
1 school (the senior high school) would be 72 percent white

In the West End and Northside of the city, the percentages generally would be as follows; with a total of 19 schools (eight schools being paired) the three high schools would be as follows:

1 school would be 91 percent black
1 school would be 72 percent black
1 school would be 72 percent white

and of the elementary and middle schools:

3 schools would be 100 percent black
1 school would be 97 percent black
1 school would be 96 percent black
1 school would be 92 percent black
1 school would be 80 percent black
1 school would be 64 percent black
1 school would be 61 percent black
1 school would be 54 percent black
1 school would be 51 percent black
1 school would be 83 percent white
1 school would be 80 percent white
1 school would be 72 percent white
1 school would be 60 percent white

It is patently obvious that the majority of those schools, as in the East End, are readily identifiable as either a black or a white school.

In the newly annexed area of the city, an area which is almost all white, under the proposed HEW plan the percentages would be as follows:

1 school (the high school) would be 99.26 percent white

2 schools would be 100 percent white
6 schools would be between 95–98 percent white
1 school would be 89 percent white

As a consequence, each of the schools is readily identifiable as being a white school.

The burden is upon the school board to erase the racial identity of schools, and this the HEW plan has failed to do.

Accepting the testimony offered by the school board in support of the HEW plan in a literal fashion, the court finds that (1) no consideration was given to race in the preparation of the plan—a theory which has long passed on; and (2) the plan was drawn in spite of the awareness of the school board of the pattern of residential segregation within the city of Richmond.

The cases are legion in which the courts have consistently stated that regardless of the method used by a school board, whether it be freedom of choice, geographic zoning, pairing, or any other method, they may not continue the operation of a dual system of schools.

Whereas, as heretofore pointed out by the court, all of the difficulties which this court now faces were not in whole created by the actions of the school board alone, it is patently obvious that school construction and faculty assignment, coupled with all of the other discriminatory practices engaged in and encouraged by local, State, and Federal agencies, as well as private discriminatory practices, require that the plan submitted be disapproved by this court on the ground that, while the assignment of pupils to neighborhood schools is undoubtedly both a sound and desirable concept, it cannot in this circuit be approved if residence in a neighborhood is denied to Negro pupils solely on the ground of color, as this court has found.

The City of Richmond and Annexation

The city of Richmond is surrounded on all sides either by Chesterfield or Henrico County. On January 1, 1970, under an order of annexation entered in the circuit court of Chesterfield County, the city of Richmond was granted certain territories of Chesterfield County.

The exhibits before this court indicate that during the trial of that litigation it was represented by the city of Richmond that the entire area of the present city limits (including the area that was successfully annexed) is anticipated to be within a 30-minute maximum in travel time for one going into or out of the center of the city.

As a consequence of that annexation, it is common knowledge that it was estimated that there were brought into the city limits approximately 40,000 additional residents, and it was estimated during that trial, which was not concluded until July of 1969, that prior to the annexation the city of Richmond was composed of approximately 218,000 persons. Included in the newly acquired citizens of Richmond was a school population of approximately 8,135 students (it was anticipated that this would be the number from the annexed area attending Richmond schools commencing in September 1970). Of that total student population, 97.5 percent were of the white race and 2.5 percent (206) were black. Therefore the court concludes that the racial composition of the newly acquired territory is overwhelmingly white.

The annexation decree provided that there would be turned over to the city of Richmond upon payment of certain sums 13 school properties. Those buildings, which the city acquired from the county, would not have sufficient space to take care of all the student population living within the annexed area, there being 3,000 more students than there was building space, and it was agreed that the Richmond school board would provide transportation for children in the annexed area until such time as public transportation becomes available. The agreement provided that Chesterfield County would take care of the excess students at the elementary level until September of 1971, and the excess secondary students until September of 1972.

The court decree itself, which granted to Richmond approximately 23 square miles, provided that the city of Richmond would construct the necessary schools to serve the annexed area at an estimated cost of $15 million, which included reimbursement to the Chesterfield County School Board for its costs in the construction of three elementary schools for which the Chesterfield County School Board was to acquire sites approved by the city at prices to be approved by the city, and was to undertake to build the three elementary schools aforementioned to city specifications and design as directed by an architect selected by the city at contract prices approved by the city. In this connection, the sites have been aquired although no construction has been commenced by reason of an injunction entered by this court.

The court finds that the site selection for the elementary schools was made without consideration of the city's being required to effectuate a unitary school system. As one witness stated, most of the work in connection with that aspect of what apparently was a consent decree ". . . was done in one night down at the Chesterfield Courthouse."

The burden is on the school board to show that any new construction will effectuate and assist in the estabishment of a unitary system as distinguished from hindering same.

Of the school properties operated by the defendant school board, 28 have been constructed for over 50 years and one has been in use since 1881.

TRANSPORTATION

There is nothing special about the utilization of buses in connection with the Richmond school system. For years schoolbuses have taken students across the James River to classes while the schools were operated in a segregated manner. In the last school year students rode regular VTC service routes across the James River to schools. While the Virginia Transit Co. buses all display signs reading "Caution—Schoolchildren," their buses are not the conventional yellow schoolbus and hence do not meet the required standards of the Virginia State Department of Education in order to be classified as schoolbuses under laws, concerning eligibility for reimbursement for operating costs.

The Commonwealth of Virginia financially assists only county or city operated schoolbus systems which conform to certain regulations. Briefly, the Legislature of Virginia appropriates a lumpsum of money. This money is distributed according to a formula that the State board of education has adopted and actually amounts to a division of the funds on the basis of 40 percent for pupils transported in the previous year, 40 percent for miles the bus has traveled the previous year, and 20 percent for buses in use during the current year. The appropriations made by the Legislature of Virginia for the past school year in assisting localities to defray the cost of transporting students was $9,140,460.

Over 60 percent of the students attending public schools in Virginia were transported on schoolbuses as defined by the State board of education. The operating cost per student in those cities operating schoolbuses throughout the State averaged $23.02 for the year 1968–69. This represented an average of 122 students per each bus operated.

The operating cost per student for counties during that year was $30.61, based on an average of 87 students per bus. The average cost of operating a schoolbus in Virginia during the school year 1968–69 for cities was $2,814, for which the cities were reimbursed by the State sums approximating half of these operative costs.

School boards may, under Virginia law, provide for the transportation of pupils. Over half a million students were transported throughout the State of Virginia during the school year 1968–69. During the school year 1968–69, the average number of pupils transported per bus in the cities of Virginia was 122; the average miles per bus per day was 42—ranging from 18 to 90 miles. In order to be eligible for State financial assistance, a bus must travel a minimum of 16 miles per school day. Statistics show that children transported on schoolbuses are safer than those who travel on foot.

During the 1968–69 school year, approximately 18½ million schoolchildren were bused to school each day in the United States.

The 63–66 passenger capacity schoolbuses heretofore referred to as having been purchased by the school board for use in transporting children in the newly annexed area were purchased at a cost of $7,500 per bus.

Were the system for the the operation of schools in the city of Richmond the same this coming year as the year 1969–70, it can readily be seen that it was anticipated that approximately 10,000 students would have been transported either by school board buses or V.T.C. on a daily basis during the school year, as contrasted with plaintiffs' proposed plan which would require, if implemented, the transportation of approximately 15,000 students; and if all children living more than 1 mile from the school to which they would be assigned under the school board's recently submitted plan, hereinafter referred to as the board's second plan, were transported, transportation facilities would be required to accommodate 15,903 students. Assuming further that the school board's estimate that of those 15,903, approximately one half, so it is anticipated, would provide transportation of their own in one form or another, it still would require transportation of 7,951 students using the facilities of the Virginia Transit Co., plus the 4,991 to be transported under the direct auspices of the school board, for a total of 12,942 students.

The court finds further that unquestionably, regardless of what plan may ultimately be approved, the children in the newly annexed area of Chesterfield will require transportation by virtue of the physical surroundings, that is, lack of sidewalks, et cetera.

DEFENDANT SCHOOL BOARD'S SECOND PLAN

At the conclusion of the hearing on June 26, 1970, the court announced from the bench its inability to accept the HEW plan for the reasons stated in the record of that hearing, and the court adopts and incorporates herein its findings and conclusions as enunciated from the bench at that time. The court did, as heretofore set out, grant leave to the school board to submit another plan if they so desired. That plan was filed on July 23, 1970, and a hearing on same was conducted on August 7, 1970.

The plan itself, of necessity, was drafted with a view in mind to utilize transportation where required. The court finds from the evidence that the Virginia Transit Co. can accommodate such additional volume of transportation as may be required to implement this second proposed plan.

While the court must frankly state that more will have to be done to so conform to the law as interpreted by the fourth circuit and the U.S. Supreme Court, it is obvious that an effort has been made by the defendant school board to improve its former suggested presentation. For example, their plan now provides for majority to minority transfers at the cost of the school board. They have amended their suggested faculty assignments to conform to the requirements of law.

HIGH SCHOOLS

Two of the high schools under the proposed plan are readily identifiable—Huguenot's student population will be 71 percent white and 29 percent black; John F. Kennedy's student population will be 71 percent black and 29 percent white.

Two other high schools have a disproportionate number of black to white students. Nevertheless, the progress that has been made is evidenced in the comparison of racial mix so designated in appendix C.

MIDDLE SCHOOLS

At the middle school level, certain of the schools remain identifiable as black or white.

ELEMENTARY SCHOOLS

That portion of the proposed plan which the court finds most difficult to approve has to do with the elementary level, for unfortunately almost 9,000 black students attending 13 schools will be attending schools the population of which will be 90 percent or more black, and four schools will remain all white. In addition, other elementary schools are racially identifiable.

The court, bearing in mind the rationale that a segregated school is inherently unequal and recognizing further that those students who have been and are being subjected to segregated education in the public schools are, regardless of race, having thrust upon them educational infirmities which are constitutionally impermissible, is much disturbed about the racial composition anticipated under the school board's plan for the eight schools heretofore referred to.

It must be understood that the court would, in its opinion, be duty bound to reject the school board's plan under consideration were the plan one which had been submitted for consideration in sufficient time for the board to accomplish that which is required by law for the opening of school in September. This pan, which the court is approving on an interim basis, is being approved by reason of the fact that it is the school board's plan, that they consider it educationally sound and capable of immediate implementation." (End of excerpt from *Bradley, supra.*)

Joinder of State and County Defendants

In December 1970, the court granted leave to have the present State and county officials joined as party defendants. See, *Bradley* v. *School Board of City of Richmond*, 51 F.R.D. 139.

By April 1971, the court, after additional hearings wherein the further issues now before the court in reference to the joined defendants were not raised, approved one of three plans then before the court for the operation of the schools of the city of Richmond for the year 1971–72. See *Bradley* v. *School Board*, 325 F.Supp. 828 (1971). The plan, designated plan III, is the one under which the city schools are currently operating.[1]

The vast amount of evidence taken at the latest hearings, and the seeming complexity of the issues raised, dictate that the court's treatment thereof cannot, unfortunately, be adequately set out in summary findings.

The plaintiffs and the school board of the city of Richmond, moving parties as to the issues under consideration, take slightly variant positions; their differences, however, are not significant for the purposes of this memorandum opinion. Briefly, these parties contend that the public schools of the existing city system, with a majority black population, are racially identifiable as currently administered, when viewed, as they contend it should be, as part of the statewide educational plant which is dedicated in part to fulfilling the needs of the Richmond metropolitan area, including the city and the two adjoining counties. They allege further that discriminatory acts on the part of the now principal defendants have in the past and still do contribute to produce and maintain what when viewed in the context aforementioned, amounts to dual school systems. In addition, they contend that unless the requested relief is granted, the pupils of the city of Richmond schools, and particularly members of the plaintiff class, will not receive the equality of education to which they are constitutionally entitled.

The proponents of the relief sought contend that a greater degree of desegregation can and should be afforded in what was, and even now is, a dual system. It is their position that the complained of situation has been brought about by, among other things, school division boundaries created and maintained by the cooperative efforts of local and central State officials. The defendants deny the factual allegations and challenge the legal conclusions.

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[1] Other matters in reference to this suit are to be found in 324 F.Supp. 396 (motion for three judge court, denied); see also, 324 F.Supp. 439 (motion to recuse, denied); 324 F.Supp. 401 (motion to dismuss or for partial summary judgment, denied); 324 F.Supp. 456 (motion for implementation of Plaintiff's plan at midyear denied) (defendant city school board's motion to vacate construction injunction, granted in part and denied in part); 53 F.R.D. 28 (motion for counsel fees, granted).

A principal, though not the sole issue, is whether the constitutional duties of appropriate officials, central and local, are of such limited extent as to preclude the granting of the relief called for.

GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court concludes, in the context here presented, that the duty to take whatever steps are necessary to achieve the greatest possible degree of desegregation in formerly dual systems by the elimination of racially identifiable schools is not circumscribed by school division boundaries created and maintained by the cooperative efforts of local and central State officials.[2] The court also concludes that meaningful integration in a biracial community, as in the instant case, is essential to equality of education, and the failure to provide it is violative of the Constitution of the United States.[3]

A brief examination of the current data and that of recent years showing pupil assignment patterns in schools of the three political subdivisions of Richmond, Henrico, and Chesterfield, shows both great disparities in 1971 racial composition, making both individual facilities and entire systems racially identifiable and also a very recent history of the maintenance of a great number of one-race schools. Some such still exist. The recent statistical history of these school divisions is set forth in accompanying tables. Appendix "A".

Racial identifiability of schools and school systems is both a legal concept—a conclusion of law, ultimtely—and a fact of major significance to educators and lay persons. For the law's demands parallel those of educators. Although some school authorities have been slow to accept the fact, it is true that the constitutional wrong condemned in *Brown* imposed, and continues to do so, genuine damage upon children in schools that educators see as racially identifiable. The goals long considered by educators to be necessary and valid purposes of public education cannot be achieved in them. The legal presumption follows close upon these discernible facts.

> No per se rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, at 26.

Of great relevance to educators in evaluating and determining the identifiability—a perception of students, faculty, and community perception—is the historical context within which a school of disproportionate composition exists. Where, as in each of the three political subdivisions here under discussion, authorities have maintained segregated systems, it is of little significance that a given facility may have changed from a school attended by whites to one attended by blacks, or may be in transition. In the context of a continuing dual system, such schools do not lose racial identifiability but are perceived by whites and blacks as ones which are "going black" or "black." To say that such schools are "resegregated" implies not unfairly the continued official involvement in the creation and maintenance of schools identified as intended for one race. The process in the past has taken place by wholesale official reassignment of student bodies and faculties. More recently, under free choice and similar token approaches to desegregation, whereby most schools remain either all black or all white, the changes in school populations have been almost as rapid. Courts recognize that rapid changeovers of this sort also occur in systems under zone assignment plans which preserve the existing patterns to any significant extent. The law therefore dictates that school systems are not effectively desegregated either by piecemeal approaches or compartmentalization, or by separate consideration of particular geographic areas. See, for example, *Davis* v. *Board of School Commissioners of Mobile*, 402 U.S. 33 (1971); *U.S.* v. *Board of School Commissioners of Indianapolis* (S.D. Ind., August 1971);[4] *Haney* v. *Sevier Co.*, 410 F. 2d 920; Swann, 431 F. 2d 138 (4th Cir. 1970), rev'd. in part, 402 U.S. 1 (1971); *Yarbrough* v. *Hulbert-West Memphis School District No. 4*, 329 F. Supp. 1059, 1065 (E.D. Ark. 1971). The weakness of such an approach, noted by courts, is that it preserves the racial identifiability of individual facilities. Racial identifiability, therefore, is a function of the compostion of the school community and the pupil assignment scheme for the individual schools.

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[2] *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968); *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[3] 14th amendment to the Constitution of the United States; *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Bd. of Education*, 347 U.S. 483 (1954).

COMMUNITY PERCEPTIONS

Schools the racial composition of which departs significantly from the community parity, educators agree, are perceived by parents, teachers, administrators, public officials, pupils, and the community at large as facilities designed and operated for one race or the other. Generally schools attended under these circumstances by disproportionate numbers of black students are perceived as inferior. Experts generally concur that this has adverse effects not only on black pupils and teachers, but the entire community. This impact affects both the cognitive and affective development of the pupils. Analogous effects impede the development of white students in disproportionately white schools. In the case of the black student, impairment in the affective domain, that of perception of one's own ability to learn, to function in society, and to control one's destiny, is coupled with failure to advance in the cognitive sphere. Experts agree that this adverse impact cumulates in effect and is most telling in the earliest years.

The damaging stigma of inferiority carried by the identifiably black school is augmented by the community's understanding of the official attitude toward the situation. In Virginia the State's traditional policy of racial separation in all phases of public and private life, the historical policy of educational disparities, beginning with the refusal to afford any education to blacks, proceeding through limited, segregated education (see, *e.g.*, *Corbin* v. *County School Board of Pulaski County*, 177 F. 2d 924 (4th Cir. 1949)), the systematic obstruction of the rights enunciated in *Brown*,[5] and the deliberate policy to perpetuate segregation through numerous techniques of circumvention,[6] have in combination made clear to white and black members of the community the favor and satisfaction with which the State power views the continued segregation of the schools. Attitudes held throughout the citizenry affect the children in school. They are passed on by black parents, themselves most likely victims of discrimination, and by teachers, who are unlikely to associate the endorsement of containment with great academic expectations. These ideas are adopted by pupils, and the more so when they see them put into current effect in such instances as discriminatory treatment of black faculty members. The element of legal compulsion which lies behind State-mandated segregation strongly augments in fact the damage which ensues from racial isolation.

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[4] 332 F. Supp. 655. See also, *Northcross* v. *Board of Education, Memphis City Schools, et al.* (W.D. Tenn. December 1971); *Dandridge* v. *Jefferson Parrish School Board*, 332 F. Supp. 590 (1971).

DUTY OF COURT

Upon a finding of a 14th amendment violation it is the duty of a district court to intervene to "eliminate from the public schools all vestiges of State-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971). "The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools." *Id.*, 26. In its task the court's goal must be dismantling of the dual system and the operation of facilities identifiable not as black schools or white schools but "just schools." *Green* v. *County School Board of New Kent County*, *supra*.

DUTY OF OFFICIALS

It is in 1971 accepted law that a school system formerly operated on a basis of compulsory racial segregation will not in every case be found in compliance with the Constitution if an assignment system, perhaps nondiscriminatory when viewed alone or in some other context, is put into use within its jurisdiction. Freedom of choice or residential zone plans will not in every case prove legally acceptable, and in fact they must be abandoned if in practice they fail to dismantle the dual system. *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968).

The courts have not always so emphatically spelled out the extent of school authorities' affirmative duty. Only a few years ago purportedly neutrally drawn zone lines or neutrally administered freedom of choice plans were accepted in fulfillment of the duty to desegregate. *Gilliam* v. *School Board of City of Hopewell*, 345 F. 2d 325 (4th Cir. 1965); *Bradley* v. *School Board of City of Richmond*, 345 F. 2d 310 (4th Cir.), *rev'd. on other grounds*, 382 U.S. 103 (1965). In the light of intervening Supreme Court rulings, such standards no longer apply where the racial identifiability of schools remains intact.

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[5] See, *e.g.*, *Adkins* v. *School Board of City of Newport News*, 148 F. Supp. 430, *aff'd.* 246 F. 2d 325, *cert. denied* 355 U.S. 855 (1957).

[6] *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Griffin* v. *State Board of Education*, 296 F. Supp. 1178 (1969).

DIVISION LINES

Attendance zone lines formulated by adhering to the most natural bounds of neighborhoods or according to strict proximity of pupils to facilities will not pass muster if the effect is to prolong the existence of a dual system of racially identifiable schools. This is so even though the application of such attendance plans might be more economical in time and transportation cost, might facilitate the operation of more extracurricular school activities, and might make possible the rather uncertain benefits which some educators attach to the walk-in school. It is not that these may not be valid and rational educational goals; the point is that the end of desegregation may not be subordinated to them.

Henry v. *Clarksdale Municipal Separate School District*, 409 F. 2d 682 (5th Cir. 1969), rejected a zoning plan which, though formulated in good faith, did not work to desegregate the system. Motive was held irrelevant:

> It is irrelevant because the ultimate inquiry is not whether the school board has found some rational basis for its action, but whether the board is fulfilling its duty to take *affirmative* steps, spelled out in *Jefferson* and fortified by *Green*, to find realistic measures that will transform its formerly de jure dual segregated school system into a "unitary, nonracial system of public education." *Id.* 687.

Clarksdale is a peculiarly strong case because the "natural" obstacle of a railroad track was deemed insufficient to justify a zone line running along it. The line also coincided with the division between custom-segregated neighborhoods, thus carrying into schools the results of housing segregation. Rationality alone of the zone plan failed to justify this outcome. See also, *Board of Public Instruction of Duval County* v. *Braxton*, 402 F. 2d 900 (5th Cir. 1968), where zone lines following the historical bounds of segregated neighborhoods were found invalid.

If further proof were necessary that even physical obstacles of the most natural sort will not be acceptable as zone boundaries when they produce racially identifiable schools, there is *United States* v. *Greenwood Municipal Separate School District*, 406 F. 2d 1086 (5th Cir. 1969), which held insufficient a white school zone "bounded on the north by the Tallahatchee River and on the south by the Yazoo River," *Id.*, 1092.

Safety considerations are entitled to weight in the formulation of zone lines, but where the same obstacles which are proffered as assignment barriers for children in a purportedly unitary system which were crossed with regularity under the dual system, the argument will fail. Officials can hardly assert the compelling nature of obstacles which they overcame earlier in order to perpetuate segregation:

> The Board's concern for the safety of children who would have to cross railroad tracks or a bayou in order to attend school is entitled to weight, but we find it unconvincing in the context of developing a desegregation plan appropriate for Indianola. Until 1965, when the school board took its first action to comply with the *Brown* decision of 11 years

> earlier, students of both races freely crossed these hazards, in order to maintain the racial purity of Indianola's schools. *United States* v. *Indianola Municipal Separate School District*, 410 F. 2d 626 (5th Cir. 1969).

Davis v. *Board of School Commissioners of Mobile County*, supra, establishes definitively that existing physical features—there an interstate highway—should not impede efforts "to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Id.*, 37. If physical demarcations do not limit the duty of the court to use "all available techniques," *Id.*, 37, so much the less should political boundaries, when they coincide with no tangible obstacles and are unrelated to any administrative or educational needs.

PRIOR PRACTICE

The implications of this doctrine for the Richmond metropolitan area are obvious. The school division lines here, and in other parts of the State where similar separate political entities exist, have never been obstacles for the travel of pupils under various schemes, some of them centrally administered, some of them overtly intended to promote the dual system. The court does not hesitate to advert to the crossing of school division lines in instances outside the Richmond metropolitan area, because the barriers here in existence do not coincide with substantial physical obstacles. They are political demarcations only.

The State board has never forbidden by regulation the exchange of pupils across political subdivision lines. It has promoted the crossing of lines for purposes of operating regional segregated schools. It has approved the merger of two political subdivisions into a single school division, for the purposes of facilitating the adoption of schemes of joint schools and the provision of education by contract for residents of one political subdivision by the officials of another. It has regulated in detail the operation of joint schools, approved the initiation of joint school operations, and approved contract systems within and between school divisions. It has disbursed funds for transportation required under such systems and even paid for the shipment of pupils to other States in segregated groups.

Earlier judicial opinions bear witness to Virginia's policy permitting the transportation of pupils across political subdivision lines for the purposes of maintaining segregation. *Buckner* v. *County School Board of Greene County*, 332 F. 2d 452 (4th Cir. 1964); *School Board of Warren County* v. *Kilby*, 259 F. 2d 497 (4th Cir. 1958); *Goins* v. *County School Board of Grayson County*, 186 F. Supp. 753 (W.D. Va. 1960); *Corbin* v. *County School Board of Pulaski County*, *supra*.

The State board has been deeply implicated in the administration of the tuition grant and pupil scholarship programs, which were operated completely independently of the wishes of local school officials and resulted in mass movement of pupils across political boundaries in the Richmond area and throughout the State as well, to the extent that it was necessary to appeal to local school boards to confer in order to coordinate the exchange of pupils. In the Richmond area, notably, when the scholarship program was at its height, support for local school expenditures in the counties was high as well.[7]

These instances—and there are others—of the education of pupils of one political subdivision in schools run in whole or in part by officials of another demonstrate as a matter of historical fact the insubstantiality of any argument that strong State concerns support their maintenance as barriers to the achievement of integration. For the State has countenanced much more than the plaintiffs seek here. Standard practice has encompassed schemes under which students are educated in systems financed and operated by local officials wholly irresponsible, in the political sense, to residents of the students' home area. Centrally enforced uniformity in certain educational practices has no doubt helped to make this acceptable. But here the plaintiffs do not demand that desegregation take place by means that render school authorities politically irresponsible to the parents of the children they teach. Means are available, such as the consolidation form presented in Virginia law, by which representatives of each political subdivision will have a role in management of a combined school system. Flexible State law provisions for financing exist as well. The State cannot insist that compliance with its own statutory policy violates some substantial interest. This is so especially in the light of the recurrent successful use of the joint system of school management, which entails the operation of facilities by a committee of control, having representatives from participating school divisions, with financing provided by the political bodies of each.

SEGREGATION PATTERNS

Not only do the existing barriers have no relation to natural obstacles or substantial governmental interests, but they are related to strict housing segregation patterns, maintained by public and private enforcement and owing their genesis in substantial part to the manner in which the three school divisions have been operated and expanded. Thus by the maintenance of existing school division lines the State advantages itself of private enforcement of discrimination and prolongs the effects of discriminatory acts of its own agents. *Brewer* v. *School Board of City of Norfolk*, 397 F. 2d 37 (4th Cir. 1968), holds that zone lines unjustified by the existence of natural impediments to movement across them are usually unacceptable where they result in segregation. Moreover, the court said in *Brewer*, they are unacceptable on another ground when they work to assign pupils according to their residence in neighborhoods which are homogeneous by reason of privately enforced housing segregation. The proof here overwhelmingly establishes that the school division lines between Richmond and the counties here coincide with no natural obstacles to speak of and do in fact work to confine blacks on a consistent, wholesale basis within the city, where they reside in segregated neighborhoods.

School authorities may not constitutionally arrange an attendance zone system which serves only to reproduce in school facilities the prevalent pattern of housing segregation, be it publicly or privately enforced. To do so is only to endorse with official approval the product of private racism. It is tantamount to the reestablishment of the dual system under a new regime and falls well below the affirmative action necessary and required to desegregate a biracial system.

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[7] A more detailed reference to this program, once termed tuition-grant, is made at p. 137, *infra*.

> For a school board to acquiesce in a housing development pattern and then to disclaim liability for the eventual segregated characteristic that such pattern creates in the schools is for the Board to abrogate and ignore all power, control and responsibility. A board of education simply cannot permit a segregated situation to come about and then blithely announce that for a Negro student to gain attendance at a given school all he must do is live within the school attendance area. To rationalize thusly is to be blinded to the realities of adult life with its prejudices and opposition to integrated housing. *Davis* v. *School District of City of Pontiac*, 309 F. Supp. 734, 742 (E.D. Mich. 1970), *aff'd.* 443 F. 2d 573, *cert. denied*, *91* S. Ct. *233* (1971). See also, *United States* v. *Board of Education, Independent School District No. 1, Tulsa County*, 429 F. 2d 1253, 256 (10th Cir. 1970); *United States* v. *School District 151 of Cook County*, 404 F. 2d 1125, 1131 (7th Cir. 1968); *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 375 F. 2d 158, 165 (10th Cir. 1967); *Taylor* v. *Board of Education of City School District of City of New Rochelle*, 294 F. 2d 36 (2d Cir. 1961); *Bradley* v. *Milliken*, Civil Action No. 35257, *40* U.S.L.W. *2192* (E.D. Mich., Sept. 27, 1971), slip opinion at 10, 12; *Johnson* v. *San Francisco Unified School District*, No. C–70 1331 SAW, —— F. Supp. —— (C.D. Cal., July 9, 1971) slip opinion at 2.

When school authorities, with knowledge that other available opportunities for pupil assignment will produce less segregation, deliberately select one employing zones drawn in coincidence with housing segregation, their action by inference is discriminatory, and evidence to rebut such a finding must be "clear and convincing," *Brewer* v. *School Board of City of Norfolk*, *supra*, 41. No such showing has been made in this case, and the conclusion of segregatory intention from this, as well as other evidence, in unavoidable. For the power to temper the marked racial identifiability of the three school systems exists, and it has gone unused.

EDUCATIONAL DEPRIVATIONS

Housing segregation and resultant educational deprivations are in another sense traceable to discrimination by school authorities. Where, as here, there has been an historical practice of making available to blacks an inferior public education in terms of conventional, tangible measures and also in terms of the intangible benefits resulting from an integrated education, effects of these educational policies remain observable today and have a discernible impact upon the extent of housing, employment, and school segregation. To appreciate fully the impact of segregation on the affective and academic sides of an individual, as several educational experts said, it is necessary to study the course of his entire life. Inferior education limits achievement. Employment discrimination aside, it depresses earning power and restricts the choice of employment. This in turn narrows the range of housing options, confining its victims to low-cost central city sites located near public transportation and low-skilled jobs. When the parents' housing is so fixed, so is the child's. Inferior education also confers on the parent and the child the burden of low socioeconomic status, with consequent demonstrated adverse effects on achievement in school. These are the products of past wrongs by educational authorities of the State.

The duties of current educators are affected by such violations of the Constitution. In *Gaston County* v. *United States*, 395 U.S. 285 (1969), the Supreme Court affirmed a ruling that an "impartial" literacy test could not be applied as a qualification for voting without the "purpose or . . . effect of denying or abridging the right to vote on account of race or color," 42 U.S.C. section 1973b(a), in a county where blacks historically had been provided with a segregated and inferior education. The same "readily inferable" impact on literacy attainment for voting purposes is here shown to affect achievement generally, insofar as it determines job opportunities and social status. When, likewise, the State's educators impose "impartial" methods of school division organization on the black children of families, heads of which were deprived, as they well knew, by themselves or their official predecessors of an equivalent education to that given whites, they continue knowingly a system which prolongs its own discriminatory and segregatory policies.

In other contexts courts have likewise recognized the enduring effects of educational deprivation upon specific opportunities. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court rejected under the 1964 Civil Rights Act educational attainment and aptitude test qualifications for employment which effectively eliminated from consideration far more blacks than whites and had no relation to job performance. Blacks' relative difficulty in surmounting the obstacles appeared, the Court said, to be "directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County* v. *United States*, supra. . . . The act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation . . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.*, 430–32.

Testing procedures in the school desegregation context have as well been disapproved as components of desegregation plans. See, *e.g.*, *United States* v. *Sunflower County School District*, 430 F. 2d 839 (5th Cir. 1970); *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (5th Cir. 1970), *rev'd in part sub nom. Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970).

In the Richmond metropolitan area, assignment under the current school division arrangement creates a "built-in headwind" for the black child seeking a desegregated education. For with his school assignment determined by his residence and with his residence strongly influenced by his parents' economic attainments (putting aside the question of housing discrimination), deficiencies in the public education given blacks make it highly likely that his home will be in the city, where housing and transportation are relatively inexpensive.

SCHOOL CONSTRUCTION

School construction policy has contributed substantially to the current segregated conditions. Schools have been built and attendance policies maintained so that, even within existing school divisions and by comparison with the racial ratios prevailing therein, new or expanded facilities were racially identifiable. The evidence shows that this was purposeful, its immediate and intended result was the prolongation and attempted perpetuation of segregation within school divisions.

The longer term impact of the same policy has been the exaggeration of the racial disproportion between the city and the two neighboring counties. This has come about by virtue of the maintenance of school division lines as obstacles to pupil assignment for purposes of desegregation while the area's housing patterns, when its population grew, became increasingly segregated. The continued operation of the schools of each subdivision as racially identifiable facilities moreover necessarily caused each new school and old ones as well to take on the label of a black or white school. In consequence of prevailing housing segregation, which by its nature perpetuates itself and expands, increasingly as the population of the area grew larger the facilities, old and new, located within the lines describing the city of Richmond became identifiable as black schools, and those in the two counties were nearly all perceived as white schools. The racial identifiability of the entire systems in issue—those of the three school divisions—became manifest when, very recently, attempts were made to desegregate the schools of each division within its own borders. Currently the Richmond system is identifiable as black, and that of each county is perceivably a white system.

Furthermore, not only has the manner of expansion of the community's school plant been such as to partake of the discrimination inherent in its housing patterns, but also it has played a substantial part in the development of those patterns. In addition, school officials have been abetted in the perpetuation of housing discrimination by other governmental agencies.

The outcome of these practices—racial identifiability of systems and of individual facilities within each—cannot now be reversed without the implementation of pupil assignment policies which entail the crossing of school division boundaries. This applies both to newly constructed schools and those which long ago served as components of the officially compelled dual system.

In the light of all the evidence the insistence now by school authorities upon a system of separate attendance districts within the enlarged community reflects the desires of the State's central and local officials, based a least in part on their perceptions of their constituents' wishes, to maintain as great a degree of segregation as possible.

The fourth circuit has recognized the potential that school construction and expansion programs have, coupled with assignment plans geared to residential location in some respect, to create or perpetuate denials of equal educational opportunity in building upon and incorporating into the school system existing housing segregation. *Brewer* v. *School Board of City of Norfolk, supra.* Other circuits have held as well that this is a violation of the 14th amendment.[8]

In *Davis* v. *School District of City of Pontiac*, 309 F. Supp. 734 (E.D. Mich., 1970), aff'd. 443 F. 2d 573, cert. denied, 92 S. Ct. 233 (1971), legal liability for existing segregation was established in part on the ground that the school board had repeatedly advised the community over a 20-year period that it recognized the adverse effects of school segregation and intended to deal affirmatively with them, but had nonetheless taken no such action. Instead, since 1954, it had built 10 new elementary schools and altered zone lines 12 times, each time without consideration of the effect of the moves on racial integration. These changes, by a continuing pattern over the years, exaggerated racial imbalance in the system.

> When the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance the situation. Sins of omission can be as serious as sins of commission. When a board of education has contributed and played a major role in the development and growth of a segregated situation, the board is guilty of de jure segregation. . . . It would be feigned modesty on the part of any board of education to suggest that it is controlled by a situation rather than that it can control. *Id.*, 741–42.

When a school board, having demonstrated concern for problems of segregation, and operating in an area where segregated housing patterns prevail and are continuing, builds its facilities and arranges zones so that school attendance is governed by housing segregation, it is operating in violation of the constitution. *Id.*, 742.

> Once it has been demonstrated as it has in this case that attendance lines were consistently drawn in such a fashion so as to discourage achievement of integration when such need not have occurred, the presumption can be made that the results reached were intended. *Id.*, 744.

INTENTION TO PERPETUATE

These conclusions apply in a case where no history of other past intentional segregation was relied on in order to establish an affirmative duty to desegregate. In a situation such as the instant one, when officially mandated segregation was enforced by numerous other means, the legal principles are all the more demanding, and the factual inference of intention to perpetuate segregation is the more compelling.

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[8] *Davis* v. *School District of City of Pontiac*, 443 F. 2d 573 (sixth cir.), cert. denied, 92 S. Ct. 233 (1971); *Sloan* v. *10th School District of Wilson County*, 433 F. 2d 587 (sixth cir. 1970); *United States* v. *Board of Education, Independent School District No. 1*, 429 F. 2d 1253, 1256, 1259 (10th cir. 1970); *United States* v. *School District 151 of Cook County*, 404 F. 2d 1125, 1133 (seventh cir. 1968); *Bradley* v. *Milliken*, Civil Action No. 35257, *supra*. ——— (E. D. Mich., Sept. 27, ——— F. Supp. ——— (N.D. Cal., July 9, 1971), slip opinion at 2; *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501, 517, 522 (C.D. Cal. 1970).

In *Swann* the Supreme Court recognized the effect that such site and capacity selections may have; that of "creating or maintaining a State-segregated school system." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 40 U.S. 1, 21 (1971). The Supreme Court expressly recognized that school segregation owing its origin to discriminatory site and capacity decisions is a cognizable wrong not remedied by the adoption of a nonracial assignment plan:

> "Racially neutral" assignment plans . . . may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or the distortion of school size in order to achieve or maintain artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 28.

Construction in both counties has tended to correspond with the development of white and black residential areas, and in fact was so intended. Coupled with the hard and fast policy of not transporting pupils across school division lines to promote desegregation and also drawing attendance zones within divisions on a rough proximity basis, county construction policy has given rise to a number of identifiably white schools. Black facilities near the periphery of Richmond—the prime example is Kennedy High School, physically located in Henrico—in the meantime have been built and opened on a segregated basis because Richmond could or would not exchange pupils with the counties in order to desegregate. The counties' policies of drawing attendance zones roughly on a basis of proximity has been departed from on occasion, but so far as this record shows not in an effort to desegregate. Rather new construction was planned for black schools without regard to the possibility of accommodating an expanding black pupil population in white schools. Passing consideration of the role of any governmental agencies in the creation of segregated housing patterns by other means, the construction policies of the school administrators, in which, of course, the State board played a very substantial role, both perpetuated and manufactured anew the constitutional wrong of school segregation.

> The construction of new schools and the closing of old ones is one of the most important functions of local school authorities and also one of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential develop-

> ment of a metropolitan area and have important impact on composition of innercity neighborhoods. *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 20-21.

The latter portion of the foregoing quotation from *Swann* points up another manner in which school construction may and indeed in our instant case has contributed to school segregation. A school facility's location and its racial composition will affect the desirability of the neighborhood served by it to prospective residents. As the FHA manuals indicate, this sort of desirability is a value which real estate traders will seek to preserve as well. The racial composition of the school serving an area is a significant element in the combination of established factors which govern choice of housing sites for new residents of either race.

The interdependency of housing and school segregation is fully established by the record. Schools were planned with an eye to separate racial occupancy and opened as such, with zone and division lines imposed upon segregated housing patterns. The accommodation of expanding pupil population in new schools paved the way for new urban growth. New residents in turn were governed in their choice of housing by established patterns of residential segregation. They also were attracted to one or another zone by the opportunity to avoid school desegregation. Blacks new to the area and young black adults native to Richmond in the meanwhile were more restricted in choice of housing sites. Overall, the area's population expanded, and over time black residents, with fewer options so far as housing was concerned, comprised a greater and greater proportion of the city's residents, while the area's white occupied the suburban counties.

This was not beyond the power of school authorities in each of the areas and in the State's central offices to influence. By maintaining black schools and white schools, perceived as such, to serve particular areas, they turned such force as might have been exerted by school policies to assist in eliminating housing segregation in the opposite direction. Because the area's overall population was expanding, the consequences of the maintenance of segregated school systems were extreme.

In creating new segregated facilities to accommodate the area's expanding population, school officials not only built upon the pattern of housing segregation extant in the city and counties, but also encouraged and fostered its extension in a substantial manner. The existence of a number of nearly all white schools, together with a firm policy of refusing to relieve segregation by crossing school division lines, constituted an invitation to white persons seeking new residences in the area to discriminate in their selection according to the racial composition of the school their children would attend. Cf. *Reitman* v. *Mulkey*, 387 U.S. 369 (1967). As a result the intensity and magnitude of racial separation increased.

METROPOLITAN SCHOOLS

The marked racial disproportion between the city and each of the county systems has progressed rapidly in recent years. In substantial part by reason of the appropriate authorities having deliberately deferred so long, and still so doing, according the plaintiff class their constitutional rights, desegregation of the schools of the city and the counties as well cannot now be achieved within the current school division bounds. Perpetuation of the racial identifiability of particular facilities while each school system expanded, by means of the creation of new schools planned for one race or the other, has greatly assisted in the creation of prevailing housing segregation and thereby entrenched school segregation.

Even since *Brown I*, population growth in the metropolitan areas has consisted mainly of the addition of whites to the neighboring counties and blacks to the city. Many of the whites in particular were new in-migrants from outside the area. In 1955 the city schools were 43.4 percent black overall; Chesterfield's were 20.4 percent black and Henrico's 10.4 percent black. Now, in 1972, Richmond schools are about 70 percent black, and the population of each county system hovers around 8 to 10 percent black. [The total school population of the three jurisdiction area has expanded from 61,672 to 106,521.]

A school system is rightly termed de jure segregated even in those instances when facilities formerly all-white under the dual system have become all-black and when new racially identifiable schools with "neighborhood" or "free choice" assignment plans have been built and opened. For when individual schools are components in a segregated system, the thrust of the segregatory policy, officially instituted, affects them and the manner in which the community perceives them. It is anticipated that they will be "white schools" or "black schools." A white school, the student body of which gains a certain proportion of blacks, will be reclassified in the eyes of the community (often with the help of administrators who assign to it more black faculty members) as black, whites will withdraw in large part, and an instance of resegregation will have occurred. This cannot but occur when systems are maintained on a segregated basis and the total population expands. Instances of transition of this sort are not rare in an expanding segregated school community. In the Richmond metropolitan area the outcome has been that the city's entire school system is at present identifiably black. This was not always the case, and it is so at present in substantial part because the policy of school segregation, continued to the present, contributed to pervasive housing segregation.

For white resistance to desegregation is undeniable. The State itself has argued in other cases that white opposition will make desegregation substantially more difficult to accomplish when the blacks constitute a large proportion of the school population:

> Without community acceptance, public education as we know it now will not survive in those localities.
>
> This brings us to the second major problem in Virginia as a whole. Ratio of population is of great significance in the solution of segregation. The study quoted above is emphatic on this point:
>
> > "The ratio of Negro to white population is not a final determinant of racial attitudes, but it is perhaps the most powerful single influence, for the practical results of desegregation depend heavily upon it. This, more than anything else, seems to account for the great variation in the degree of expressed concern in the South over the stead-

> ily rising status of the Negro in the last generation—which has led finally to the demand for admission to the white schools. The Upland South, for example, found little to alarm it in the Negro's successful legal battle for the ballot, for there his numbers are not sufficient to give him control of local politics. The whites in the Black Belt, however, have had to face the prospect of becoming members of a political minority and many of them are still resisting, although the only means left to them are extra-legal."
>
> The question of ratio of population has particular significance in Virginia. The percentage of Negro school children ranges from zero in Buchanan, Craig and Highland Counties to 77.3 percent in Charles City County. Brief for appellees on further re-argument in *Davis* v. *County School Board of Prince Edward County*, November 15, 1954, in the United States Supreme Court, at 14–15.

DEMOGRAPHIC PATTERNS

The departure of whites, as has occurred in the city, in the face of an increasing black component was predictable, but it was only possible and only had reason to occur—when other facilities, not identifiable as black, existed within what was in practical terms, for the family seeking a new residence, the same community. School authorities cannot but have been aware from their experience of the tendency of individual facilities within each segregated system to take on a label of racial identifiability. Given the shifting demographic patterns, it was fully foreseeable, and was foreseen, that more and more schools in the city, new and old, would become black and in the counties most facilities, including new ones, would be obviously white.

The decisions on school locations in the three metropolitan systems were matters for central as well as local control. Each new facility or addition was approved by the State superintendent, and each played a role in molding the development of housing patterns in the metropolitan area. The expansion of the school plans, like the development of other public facilities, governs the rate of community development.[9] When they build upon and assist in the spread of segregated housing patterns, as has happened here, the school authorities create new State-enforced school segregation.

The maintenance of segregation in an expending community therefore creates problems, when a remedy must eventually be found, of a greater magnitude in the present than existed at an earlier date:

> The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of com-

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[9] See an earlier opinion in this case, *Bradley* v. *School Board of City of Richmond*, 324 F. Supp. 456 (E.D. Va. 1971), and cases there cited. Most of these opinions emphasize the extremely long-term effect that school capacity and location have upon extent of segregation and the difficulty of eradicating it.

munities, the growth of student population, movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented. *Swann* v. *Charlotte-Mecklenburg Board of Education*, supra, 14.

GOVERNMENTAL AGENCIES

In league with the defendant school administrators in perpetuating the dual school system to the extent that entire city and county school divisions have acquired the label of racial identifiability, have been governmental agencies controlling the evolution of housing patterns in the area. Segregation in housing patterns, once established, perpetuates itself and expands. New residents adhere to established patterns; private realtors adhere to governmentally enforced practices; and the pattern, once set, acquires an impetus of its own. The public housing policy in the area has, by action and inaction of the governmental bodies involved, contributed to school segregation. County policy has excluded low-income housing entirely; in the city itself, such housing has been barred when it might contribute to housing desegregation, and efforts to place it in mainly white areas in the city or the counties have been abandoned.

Federal policy to perpetuate segregated residential development and the use of racially restrictive covenants have also forced the area's housing into racially defined patterns. It is not decisive that the sources of these forces now no longer promote them; the momentum of discrimination continues.

RESISTANCE TO DESEGREGATION

A firm policy of resistance at the State and local levels to consolidation or other methods of cooperative pupil assignment on any significant scale so as to bring about desegregation, has been related at each level to racial motives. Witness, for example, the enthusiasm with which the State Department of Education explored consolidation techniques for all educational purposes save that of desegregation, and the alacrity with which the Chesterfield superintendent invited county residents to return to county schools in the fall of 1970. At each level and in each sphere of school operation, the question of desegregation has had a special status apart from other considerations of educational policy. There has been a discernible policy of refraining from taking such steps as would promote desegregation, thereby burdening the plaintiff class in attainment of their rights. Not only has this policy had a substantial impact on school segregation, but on the degree of housing segregation in the area as well. Under *Hunter* v. *Erickson*, 393 U.S. 385 (1969), such a deliberate classification, purposefully disadvantaging blacks, violates the 14th Amendment. See Ely, "Legislative and Administrative Motivation in Constitutional Law," Yale Law Journal, 1205, 1299–1302 (1970).

STATE CENTRAL ACTIONS

The educational system of the State of Virginia, like those of most other States, is operated both by officials of the State's central government, located in Richmond, and by local officials with geographically narrower authority. In numerous respects through the years, the central administrators and policymakers have issued recommendations or regulations concerning both major and minor aspects of school operation. In the management of the State system, the concept of local autonomy has several times received short shrift, especially in the matter of racial policy.

Earlier cases in this jurisdiction have established the deep involvement of Virginia's statewide officials in the administration of the State's public schools. This Court held in *Allen* v. *County School Board of Prince Edward County*, 207 F. Supp. 349 (E.D. Va. 1962), that the operation of schools was a cooperative venture by local and central officials exercising powers of State law:

> [T]he Constitution of Virginia imposes a mandatory duty to establish and maintain an efficient system of public schools throughout the state . . . .
>
> The Court finds, and so holds, that the public schools of Virginia were established, and are being maintained, supported, and administered in accordance with state law. These public schools are primarily administered on a statewide basis. A large percentage of the school operating funds is received from the state. The curriculums, school text books, minimum teachers' salaries, and many other school procedures are governed by state law . . . . Id., at 352–54.

In any event, no amount of delegation of authority pursuant to State law would deprive the system of the character, in the contemplation of courts enforcing the 14th amendment, of a structure formed, supported, administered, divided, and operated according to policies established and implemented by officials whose source of authority is State law.

> The contention that the action and inaction of the foregoing state and county officials resulting in the closing of the Prince Edward County schools was a local action, beyond the purview of the Fourteenth Amendment, is not well taken. County has been defined "as a body politic, or political subdivision of the state, created by the legislature for administrative and other public purposes." It is generally regarded as merely an agency or arm of the state government.
>
> The United States Constitution recognizes no governing units except the federal government and the states. A contrary position would allow a state to evade its constitutional responsibilities by carve-outs of small units. At least in the area of constitutional rights, specifically with respect to education, a state can no more delegate to its subdivisions the power to discriminate than it can itself directly establish inequalities. Id., at 352–54.

As this Court did in *Allen*, it does here again conclude that the public schools of the State and of the Richmond metropolitan community are administered by the State board and State superintendent in conjunction with their local delegates, the division superintendents, and locally chosen school boards. Other central and local officials, furthermore, have authority over certain aspects of school administration; most obvious is the local governing bodies' budgetary appropriation power.

Prior to the decision in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), the Commonwealth of Virginia maintained a thoroughgoing policy of segregation by race in the public schools. The doctrine was mandated by its constitution, by statutory law, and was enforced throughout the State by policymaking authorities. Attorneys for the Virginia defendants, including the State's attorney general, so represented in briefs filed 17 years ago in *Brown*:

> In general, education in Virginia has operated in the past pursuant to a single plan centrally controlled with regard to the segregation of the races. Brief for appellees, County School Board of Prince Edward County, et al., November 15, 1954, at 15.

In the years since, the powers of the State board of education and the State superintendent of public instruction have varied but slightly; what changes in law have been made have principally been to expand its powers. Other State educational agencies have come into existence and disappeared in intervening years as well. For the major part of this 17-year period the State's primary and subordinate agencies with authority over educational matters have devoted themselves to the perpetuation of the policy of racial separation. They have been assisted in this effort by new legislation creating such programs as the tuition grant and pupil scholarship systems, the pupil placement procedures, and, by enactment passed while this case was pending, placing new limitations on the power of the State board to modify school division boundaries. They have employed established techniques and powers as well to perpetuate segregation.

Only very tardily and under the threat of financial coercion has the State board of education implicated itself in any respect in the desegregation process. In so doing it has conceived of its affirmative duty very narrowly, confining its efforts to those required by its compliance agreement with the Department of Health, Education, and Welfare, and on occasion not even adhering to that.

The State board, like other State educational authorities, cannot but have been aware of the strength of the State's policy of segregation and the manifold ways in which it was enforced at the State and local level. In recent years that central board has been kept constantly informed of the status of desegregration efforts in all school divisions. Nonetheless it has scrupulously separated its involvement in the desegregation process from its other extensive activities. It has failed to inject consideration of the contribution that it might make to the dismantling of segregation into its decisionmaking processes of policymaking and review. It has instead, through administrators so motivated, intentionally perpetuated segregation, as for instance in the sphere of school construction approval. With knowledge of the impact thereof, it has refrained from taking such actions as were within its power to bring about a greater degree of desegregation. During the most recent era, when the 1964 Civil Rights Act began to force a reversal of the age-old dual system, there was only one man charged with the carrying out of the State's part of the job of desegregation, and all other functions within the State department of education appear to have gone on in disregard of his assignment. In striking contrast are the extensive affirmative efforts to promote segregation.

PURPOSEFUL FRUSTRATION

Powers enjoyed by the State board and State superintendent before and after 1954 have been exercised openly and intentionally to frustrate the desegregation of the three school divisions of the metropolitan area and others throughout the State. The known and foreseeable impact of the manner in which school construction programs were administered, including site selection, choice of school capacity, and quality of facilities, has been to perpetuate the dual system in each school division. The approval process has been buttressed in this by the powers of the purse, liberally used. The foreseen result has been the continuation of separate and racially identifiable schools, administered by members of a single race, staffed by teachers of a single race, housing pupils of a single race.

Separation in faculty was cooperatively bolstered by separate orientation programs on the local level and regular conferences on the statewide level. Black faculty members have been demoted by local administrators from positions of authority to lesser posts in connection with attempts to desegregate schools by the closing of all-black facilities in the jurisdictions here involved. The State board, of course, was informed of these changes in position. Similar practices have been condemned:

> [W]e feel that the board's consolidation policy may not be applied to where, as here, a school is closed as a direct consequence of an effort to rectify constitutional defects in the method by which pupils and teachers have previously been assigned, where the effect is to impose, without some concern for qualifications to teach, the heavy burden of unemployment solely upon those whose constitutional rights were violated, and where an additional result may be to impede meaningful realization of the constitutional rights of others, that is, the pupils. *Smith* v. *Board of Education of Morrilton School District No. 32*, 365 F. 2d 770, 780 (8th Cir. 1966.) See also, *Stell* v. *Board of Education for City of Savannah*, 387 F. 2d 486, 497 (5th Cir. 1967); *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501, 516, 523 (C.D. Cal. 1970).

The obvious and immediate impact, a "foreseeable consequence," *Id.*, 779, of the policy is to convert a dual system into at best one run primarily for and by whites. There is no evidence that demotions were ordered after a full review of the qualifications of possible candidates for positions in merged schools. Such a policy as the authorities adopted can only discourage the recruitment of black personnel. In fact the black faculty component in each county system is very small. The result, readily perceived by pupils, contributes to the racial identifiability, in the legal sense, of the county school systems.

The State's central planning department for educational transportation performed surveys and formulated the most efficient means by which to maintain the white and black school systems. The pupil placement system, administered by a now defunct central State agency, with the aid and cooperation of the State board, froze segregated attendance patterns for years. The tuition grant and later pupil scholarship programs made available to any student desiring to escape desegregation in his home school division a ready refuge in a public segregated school system or a private segregated school, and this escape route was beyond the power of the localities to bar.

Transfer patterns and optional zones have been condemned in the past when used as devices to create or maintain segregation. See *United States* v. *Board of Education, Independent School District No. 1, Tulsa County, supra*, 1260; *United States* v. *School District 151 of Cook County, supra*, 1125, 1131; *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 375 F. 2d 158, 163–64 (10th Cir. 1967); *Spangler* v. *Pasadena City Board of Education, supra*, 508–09, 512, 520; *Bradley* v. *Milliken, supra* (slip opinion at 11); *Monroe* v. *Board of Commissioners of the City of Jackson, Tenn., et al*, 391 U.S. 450.

Numerous times the State Department of Public Instruction issued written policy statements concerning the operation of joint educational programs of a general or specialized nature on a regional basis, treating the issue of school consolidation, adverting to the benefits of school division consolidation, discussing the merits of contractual school operation, and regulating the manner in which such administrative changes might be brought about. Many times the board stated its support for one or another such move. It must not be forgotten that these publications emanated from the agency to whose regulations and directions local school divisions owed a duty of compliance. And, if locally initiated, the organizational changes were nearly all, at one point or another during transition, subject to State board approval. Policy statements therefore had the effect of encouraging the pursuit of the aims endorsed by an office with special expertise and authority and of guaranteeing in advance its consent. At many times these statements supported the use of these techniques in order to preserve segregation. To this date the State board has not endorsed them in order to achieve desegregation. Such reticence affirmatively gives rise to an inference of intention, for whatever reason, to preserve such amount of racial segregation as is possible and a rejection of any affirmative obligation to assume the task of desegregation.

As centrally administered segregatory programs increased, from the days of the school closing activity which occurred in Virginia, through the pupil placement phase, and into the years of the tuition grant-pupil scholarship gambit, the State board maintained an outstanding record of deference to local wishes to maintain racially separate schools. Central authority at once increased and lay dormant. The State superintendent's authority to approve new construction was somehow construed not to apply to site selection despite express regulations to the contrary, although in extreme cases criticism was offered, but never of the creation of segregated facilities. With cautious regard for local autonomy—so flouted by pupil placement and tuition grants—the State board several times sought the consent of all affected before modifying school division lines, recognizing the effect such actions had on attendance policies. This circumspection betokens, the Court is told, lack of authority. Unquestionably authority would exist in ample measure if only the State board would promulgate the appropriate regulations authorized by its enabling legislation. The contention of want of authority is self-serving.

The officials of the State department of education, the State Board, the State Superintendent, and all officials implicated in the operation of the state educational system, have a duty owed to the individual members of the plaintiff class not to discriminate on the basis of race in the operation of the State's educational plant. This duty was made crystal clear by the Supreme Court in one of the first school desegregation matters to come before it after the *Brown* decision:

> The controlling legal principles are plain. The command of the Fourteenth Amendment is that no "State" shall deny to any person within its jurisdiction the equal protection of the laws. "A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clother with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." *Ex parte Virginia*, 100 U.S. 339, 347 . . . In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." *Smith* v. *Texas*, 311 U.S. 128, 132; *Cooper* v. *Aaron*, 358 U.S. 1, 16–17 (1958). See also, *United States* v. *Jefferson County Board of Education*, 371 F.2d 836, 873 (5th Cir. 1966), *aff'd. on rehearing en banc*, 380 F.2d 385 5th Cir. 1[illegible]67).

That duty has here been violated by the State board's continued involvement in the perpetuation of segregation by acts having the known or foreseeable effect of perpetuating the dual school system. These began with the announcements after the *Brown* decision that any action to implement its requirements would be postponed. They continued with the support of the school closing policies, in particular by the use of the tuition grant payment and special appropriation powers of the Board. They included the implementation of tuition grant and pupil scholarship legislation by numerous actions. Further, they encompassed the aid given the pupil placement system by promulgation of implementing regulations. They included as well, as the Court has pointed out, the approval of school construction programs deliberately and obviously planned to enlarge and entrench the dual system.

Legal Effect

The legal effect of these actions by the body charged with the duty of supervising the State's schools, a body the directives of which would be complied with fully by local officials, was to buttress the existing dual system and prevent its dismantling.

The official position taken by the State's central educational authority communicated to all, black and white, public officials and private individuals, the depth and tenacity of the policy of segregation. This contributed to and compounded the damage itself done by segregated public education and rendered more difficult efforts by blacks to escape segregation by means of individual initiative. See, *NAACP* v. *Patty*, 159 F. Supp. 503 (1958), *reversed on other grounds sub nom., Harrison* v. *NAACP*, 360 U.S. 167 (1959).

Federal courts in school desegregation matters may legitimately address their remedial orders to defendants with statewide powers over school operations in order to eliminate the existence of segregation in schools chiefly administered locally by subordinate agencies.

Franklin v. *Quitman County Board of Education*, 288 F. Supp. 509 (N.D. Miss. 1968) concerned a school construction program, subject to approval for partial funding by the State's educational finance commission. That body has power to determine whether a requesting locality has an adequate, efficient, and comprehensive plan for building construction. The Court ruled that it had the duty to consider proposals with an eye to their contribution to the disestablishment of the dual system to assist local boards to that end:

> Viewed in any light, the Commission is extensively involved in the business of public school education and is, therefore, not in a position to adopt a "hands-off policy" as regards the disestablishment of State-imposed segregation in a public school system. The affirmative obligation to seek means of disestablishing State-imposed segregation must be shared by all agencies, or agents of the State, including Educational Finance Commission, who are charged by law with, and who exercise official public school functions. Neutrality must be forsaken for an active, affirmative interest in carrying out constitutional commands. *Id.*, at 519.

The State superintendent of public instruction has violated this duty.

This is only one of the many respects in which the State educational authorities have abstained from taking measures to desegregate the State school system or have taken steps the obvious and inevitable effect of which was to frustrate that process.

In an analogous case, *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967), aff'd. sub nom. *Wallace* v. *United States*, 389 U.S. 215 (1967), the district court was confronted with a State educational authority enjoying broad powers over educational policy, similar to those possessed by the State officials here. Historically, there as here, the State's schools were segregated by law, and only recently had efforts begun to disestablish that pattern. In *Lee*, as in the instant case, central State officials, some in the education field and some with general executive authority, had by their various actions prolonged school segregation. "[T]he most significant action by these defendant State officials, designed to maintain the dual public school system based upon race, is found in the day-to-day performance of their duties in the general supervision and operation of the system." *Id.*, at 470. The court reviewed the central authorities' use of their power over school site selection and construction, their recommendations for and against school consolidation, their control over finances, their indirect influence over faculty assignment in authorizing the creation of new teacher posts in segregated schools and conducting separate statewide conferences, their creation, recommendation, approval, and financing of transportation policies designed to perpetuate uniracial schools, maintenance of dual systems of higher education, and implementation of a tuition grant system the purpose and effect of which was to frustrate public school desegregation. The court remarked that in each of these areas there was an affirmative constitutional duty upon State officials to seek means to bring about desegregation. Indeed they had a further obligation not to conceal or belittle the duties of local school officials under their jurisdiction.[10] The State officials had violated this obligation to take positive action in each area and instead had exercised State authority to perpetuate segregation. On the basis of these violations, the district court directed the State officials to adopt a uniform statewide plan for school desegregation, applicable to each district in the State not under current court order. This remedy included provisions among others, governing the assignment of students and faculty. As means of relief from prior violations, these requirements were legally proper, despite that the State authorities may have lacked specific authorization under State law to prescribe attendance rules or assign teachers. Moreover, the defendants there in fact had the necessary power to achieve these ends:

> It cannot seriously be contended that the defendants do not have the authority and control necessary to accomplish this result. Certainly the possibility of losing State funds for failure to abide by and implement the minimum constitutional requirements for school desegregation which this opinion and the accompanying decree require will, without any doubt, effect compliance. *Id.*, 478.

The Fifth Circuit has recognized implicitly in another case that the central educational authority of the State may be subjected to court orders for purposes of relief, that is to aid in preparing desegregation plans in cooperation with local agencies. *United States* v. *Texas Education Agency*, 431 F. 2d 1313 (5th Cir. 1970).

Our own court of appeals has stated that, upon a proper showing of the existence of continuing de jure segregation, statewide educational officials may be directed, if the remedy is deemed appropriate, to withhold State funds from segregated local systems. *Smith* v. *North Carolina State Board of Education*, No. 15,072, 443 F. 2d 6 (4th Cir., June 14. 1971). That decision vacated an order, to be sure, directed against State officials, but only in a case where the defendants were not shown to have contributed to any existing segregation nor to have the authority acting alone to remedy it, and where those allegedly responsible for the maintenance of segregation were not parties.

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[10] "It should be noted that one of the most illegal methods adopted by these defendants to impede desegregation on a local level is that they have consistently attempted to obscure the fact that local school authorities have a Federal constitutional duty to desegregate their system totally, notwithstanding whether a particular system is under a court order or whether that school system agrees to comply with the requirements of the Department of Health, Education, and Welfare of the United States." *Lee* v. *Macon Co. Bd. of Ed., supra.*, at 475.

Godwin v. *Johnson County Board of Education*, 301 F. Supp. 1339 (E.D. N.C. 1969), cited with approval in *Smith*, also supports the principle of the affirmative obligation of central educational administrators to dismantle a dual school system:

> These defendants urge that the Court impose a duty upon the local school board, an agency which is furthest removed from the seat of sovereignty and at the same time to insulate the State board of education and the State superintendent of public instruction from a similar constitutional duty and obligation. Such a distinction makes no sense in logic, frustrates rather than promotes the Supreme Court's mandate that the public schools be desegregated "now" and is without support in the law. *Id.*, 1341.

The *Godwin* court relied on State statutory authority similar to that conferred by Virginia law to establish the central officials' power to act. It also took note of a history of unconstitutional centrally administered programs in the State, including relief from compulsory school attendance, tuition grants, and school closing provisions. The court did not deem it dispositive of the central authorities' duty, however, that they might actively have pursued discriminatory policies:

> Proof of these allegations, if there be any, might well be relevant as to the kind of relief to be afforded, if any be required. Whether or not the State board or State superintendent has actively discriminated does not affect their burden to actively seek the desegregation of the public schools in North Carolina. In this case the burden rests upon these defendants, as well as upon the local school board "to come forward with a plan that promises realistically to work, and promises realistically to work now." *Green* v. *School Board of New Kent County*, *supra*, at 439. Id., 1343.

SCHOOL DIVISIONS

Before determining whether the existing city-county lines now used as school attendance boundaries possess any educational or administrative virtue save that of "natural" coincidence, the Court deems it appropriate to attempt an analysis of the manner in which the State's central educational authorities have administered Virginia's system of school divisions. Governing bodies and school boards of existing school divisions by State law have been empowered to control to a significant extent the attendance areas within which residents of neighboring political subdivisions may be assigned.

Prior to 1971, under State law it was within the power of the school board and governing body of a city or county, along with the State board of education, to determine whether a consolidated school division, operating under a single school board, should be established for it and another political subdivision. Virginia code section 22–100.2 (1969 Repl. vol.). Under prior law the State board could create a combined school division comprising more than one political subdivision without any statutory requirement of local consent. As these general and the more specific findings of fact indicate, in practice single division status centrally decreed has been highly conducive to the initiation of cooperative arrangements authorized under other provisions of State law for the operation of joint schools or education by contract, under which attendance areas are expanded beyond political subdivision lines. State board policy pronouncements no doubt strongly encouraged the adoption of such forms, but local cooperation seems to have been essential, given the limited amount of pressure that the State board has usually applied.

Under current law the creation by the State board of a single school division comprising more than one political subdivision automatically calls for the establishment of a consolidated administrative structure. Virginia code section 22–100.1 (1971 Cum. Supp.). Thus the State board, empowered to divide the State into school divisions, may determine the bounds of attendance areas. What was given with one hand was taken away and more by the other, however. New Virginia code section 22–30, enacted since the joinder of State and county defendants in this case, bars the State board of education from creating school divisions composed of more than a single city or county without the consent of the local school boards and governing bodies.[11] No longer does the State board possess the authority even to decree single division status for an area under the administration of two school boards. Authority to prescribe the bounds of the unit of school administration within which a child in a neighboring area may be assigned is therefore placed in part in the hands of local officials. Because courts recognize that the power to describe units of administration may well work to retard integration, its use is subject to judicial scrutiny. *Wright* v. *Council of City of Emporia*, 442 F. 2d 570, 572. To the extent that the State has delegated to local officials the power to determine the bounds of administrative units within the State, those local personnel must exercise their powers consistent with the State's constitutional obligations.

CITY-COUNTY LINES

If the city-county lines as attendance zone lines were drawn today by the State, it is extremely doubtful that they could withstand constitutional challenge. Cf. *United States* v. *Board of Education, Independent School District No. 1, Tulsa County*, *supra*. In view of the range of alternatives embraced by Virginia law to the organization of school attendance districts along strict political subdivision lines, in view of the past practices which show them far from inviolate, in view of the governmental acts, including those of State and local school officials, and private segregatory actions which have contained blacks on one side of the city line, and a view of the drastic effect on racial proportions of such bounds, the lines would fall as racially motivated. Furthermore, the lines in fact are newly drawn. For the State board, pursuant to section 22–30, in 1971, declared Richmond, Henrico, and Chesterfield to be separate school divisions.

In reality, however, that action was no more than another in a series which perpetuated existing conditions; it illustrates the circumstance that under earlier self-imposed State custom, and now under State statute, relief of segregation in Richmond is dependent upon the compliance of neighboring jurisdictions as well as the State's central office. There is, by contrast with *Wright* v. *Emporia, supra*, no one instance of separation which one can examine to determine its legality. But there is no necessity that there be any one determinable moment when an act was performed which one can call illegal in order for the Court to determine that a merger of, or cooperative assignments between, school divisions is an appropriate and necessary remedy for the maintenance by State officials over generations of a dual school system in each of the areas involved. In the *Haney* and *Texas* cases,[12] similar orders were addressed to officials whose sole defaults were the maintenance of district boundaries which tended to perpetuate the dual system.

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[11] The prior Virginia Code section 22–30 read as follows: "The State board shall divide the State into appropriate school divisions, in the discretion of the board, comprising not less than one county or city each, but no county or city shall be divided in the formation of such division.

When a board of education has contributed and played a major role in the development and growth of a segregated situation, the board is guilty of *de jure* segregation. The fact that such came slowly and surreptitiously rather than by legislative pronouncement makes the situation no less evil. *Davis* v. *School District of City of Pontiac, supra*, 309 F. Supp. at 742.

Here long years of maintenance of the dual system, many subsequent to formal legal declaration of its invalidity, massive and effective State-managed efforts to oppose desegregation under free choice assignment plans which caused more and more facilities in the area to become segregated by a process of white withdrawal and black occupation, have, together with forces heretofore discussed containing blacks in the city, produced a community school system divided into racially identifiable sectors by political boundaries. The problem has intensified with passing years, but its growth has been foreseeable, and all officials were well advised of its coming. At present the disparities are so great that the only remedy promising of immediate success—not to speak of stable solutions—involves crossing these lines.

RACIAL HOSTILITY

Rejection of such a solution by the county and State defendants is explicable principally in terms of racial hostility. Opposition to desegregation in the counties has been the historical pattern to the present date. State officials have been guilty of encouraging or condoning such sentiment. County officials have publicly disclaimed any obligation to play an effective role in the desegregation of schools in the area and declared their opposition to effective desegregation and disapproval of Supreme Court rulings setting forth the law of the land on the subject. Considering the historic flexibility of political subdivisions in the State and in this area in matters of pupil exchange across political boundaries and in the cooperative operation of other public utilities, in view of the several statutory patterns—part of the public policy of the State—under which cooperative ventures can be undertaken, and in view of the fact that school operation in the counties has always entailed transportation times and distances similar to those involved in the suggested metropolitan plan, resistance to the proposal appears clearly to be racially based.

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[12] *Haney* v. *Board of Education of Sevier County, supra* (8th Cir. 1969); *United States* v. *Texas*, 321 F. Supp. 1043 (E.D. Texas 1970).

Just as the city's geographic borders, viewed as limits upon pupil assignment, do not correspond to any real physical obstacles, so also are they unrelated to any marked practical or administrative necessities of school operation. The boundaries of Richmond are less than eternal monuments to a city planner's vision. They have changed several times over the years with annexations, the latest as recent as 1970. Indeed historically all of the city has been created from the two counties. These additions have not, however, encompassed sufficient territory so that the racial identifiability of school facilities in the area could be eliminated by desegregation within existing political lines. The growth of the black and white population and their relative movement have advanced far faster than the city proper has expanded. In the meantime segregation has gone unrelieved, and the number of identifiably black schools in the city has increased, as official school segregation and housing segregation fostered each other and caused the areas of black housing to expand within the city to its borders by a process of accretion.

The Constitution is violated by segregatory acts even though they were taken by officials responding to the wishes of their constituents, as they saw them. Community resistance to change affords no legal basis for the perpetuation of racial segregation. *Monroe* v. *Board of Commissioners, Jackson, Tenn., supra* (1968); *United States* v. *School District 151 of Cook County, supra*, 1133; *Northcross* v. *Board of Education of City of Memphis*, 333 F. 2d 661 (6th Cir. 1964); *Bradley* v. *Milliken, supra* (slip opinion at 25); *Johnson* v. *San Francisco Unified School District, supra* (slip opinion at 24). The consideration by officials of community reaction to desegregation is improper in formulating school zone lines:

> Where the Board is under compulsion to desegregate the schools (1st Brown case, *Brown v. Board of Education of Topeka*, 347 U.S. 483 . . .) we do not think that drawing zone lines in such a manner as to disturb the people as little as possible is a proper factor in rezoning the schools. *Northcross* v. *Board of Education of City of Memphis, supra.*

The evidence here indicates that a primary consideration in the refusal of county officials to establish cooperative school operation with Richmond has been their own concurrence with perceived constituents' opposition to integration efforts, which one county official termed "un-American." This is not a legally cognizable objection.

Such an attitude is wholly at odds with considerations of one's affirmative obligation to exercise State-conferred powers affecting school administration so as to promote that end. The State and county officials equipped to alter the limits of attendance units unquestionably have that duty, their conduct affecting deeply the educational interests of many thousands of our youth and constitutional rights of the plaintiffs. Yet they have refused to act. Such conduct is the more iniquitous when one considers that there is under the law a positive mandate charging the State with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. *Green* v. *County School Bd. of New Kent County*, *supra*.

PURSUIT OF SEGREGATORY POLICIES

The fostering of segregation consists not solely of an invidious intention or racial hostility, on the part of certain officials, however. It is also inferable from the knowing pursuit of policies which cannot but produce racial separation. *Johnson* v. *San Francisco Unified School District*, *supra*. An official preference for a mode of school organization less effective than other choices in eliminating segregation gives rise to an inference of discriminatory intention. *Brewer* v. *School Board of City of Norfolk*, *supra*. The adherence to a zone system promoting segregation carries with it a logical presumption of the purpose to segregate. *Spangler* v. *Pasadena City Board of Education*, *supra*, 522. A consistent course of conduct producing segregatory results supports an inference that the outcome was intended. *Davis* v. *School District of Pontiac*, *supra*, at 576. School officials in Virginia cannot plead ignorance of the crucial role race plays in education. When their acts perpetuate segregation or by new devices create it anew, their legality will be gauged by their natural, probable, and foreseeable effect. *Bradley* v. *Milliken*, *supra*, —— U.S.L.W. —— (slip opinion at 12, 23).

Among all those in power there has been actual knowledge of the intensifying patterns of segregation in the Richmond area, and officials have been advised by studies and expert recommendations of the need to take steps to forestall its adverse impact.[13] This Court is not alone in inferring discriminatory intention from rejection of the advice of internal and external studies. *Bradley* v. *Milliken*, *supra*, —— —— (slip opinion at 13); *Johnson* v. *San Francisco Unified School District*, *supra*, —— (slip opinion of April 28, 1971), n. 5); *Spangler* v. *Pasadena City Board of Education*, *supra*, *510–11; Davis* v. *School District of City of Pontiac*, *supra*, at 737.

Norris v. *State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va. 1971), *aff'd. 92 S.Ct. 227*, 40 U.S.L.W. —— (Oct. —, 1971), squarely supports the duty of one State institution to act so as not to obstruct the efforts of another to fulfill its constitutional duty to desegregate. There this Court enjoined the enlargement of a predominantly white junior college to 4-year status when, were it expanded, it would compete for white students with a nearby black institution, thereby perpetuating segregation.

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[13] In 1969 a retiring member of the State Board of Education, after eight years of service, placed in the minutes of the Board his sentiments on the future of public education, calling to the Board's particular attention the need for action to assist racial minorities: "A child may be disadvantaged for various reasons, but the term is generally used in relation to the urban and minority group crisis which so perplexes our nation. Although Virginia, with its smaller cities, has less of a problem than many other states, we do have serious imbalances which cause deep concern. In our larger metropolitan areas there are income deficiencies and a racial mix which result in serious educational disadvantages. The injustice, as well as the potentially disastrous social consequences of this situation, have prompted action by government at all levels as well as the private segment of our communities. There is no longer any debate as to the need for vigorous action to right this educational imbalance."

The State cannot escape its constitutional obligations by relinquishing or delegating to local officials the authority to discriminate, nor can it escape such obligations by dividing such power between them and others of statewide authority. It is axiomatic that if the power to violate constitutional rights cannot be conferred on a faceless electoral majority,[14] it cannot with impunity be placed upon local elective or appointive bodies.

Nor can local option enabling statutes be used as vehicles for the infringement of constitutional rights. *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd. 287 F.2d. 376.* and 368 U.S. 515.

The power conferred by State law on central and local officials to determine the shape of school attendance units cannot be employed, as it has been here, for the purpose and with the effect of sealing off white enclaves of a racial composition more appealing to the local electorate and obstructing the desegregation of schools. The equal protection clause has required far greater inroads on local government structure than the relief sought here, which is attainable without deviating from State statutory forms. Compare *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Serrano* v. *Priest*, 40 U.S.L.W. 2128 (Calif. Sup. Ct. Aug. 30, 1971).

In any case, if political boundaries amount to insuperable obstacles to desegregation because of structural reasons, such obstacles are self-imposed. Political subdivision lines are creations of the State itself, after all.

> [T]hey have been traditionally regarded a subordinate governmental instrumentalities created by the State to assist in the carrying out of State governmental functions. As stated by the Court in *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178, these governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," and the "number, nature, and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State." *Reynolds* v. *Sims*, *supra*, at 575.

Reynolds and its companion cases establish that denials of equal protection may not be justified by reference to the needs of a system of subordinate political entities, themselves the products of State action. A later case concerning local government apportionment demonstrates that some minor deviations from the strict standard of equal voting power is permissible when a State's representation system is dependent upon political subdivisions over which legilators exercise independent administrative functions. *Abate* v. *Mundt*, 403 182 (1971). The instant case, however, involves a much more aggravated denial of equal protection of political subdivision lines are deemed sacrosanct. More important, in contrast to the history thought relevant in *Abate*, past events in the metropolitan area and in Virginia betoken a willingness

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[14] *Lucas, et al* v *Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, n. 30, 737 (1964); *Bradley* v. *Milliken*, *supra*.

—indeed an enthusiasm—to disregard political boundaries when needful to serve State educational policies, among them racial segregation.

EFFECTS OF SEGREGATION

The findings of fact herein and in the Court's earlier opinions concerning the conduct of the school board of the city of Richmond amply demonstrate the defendants' resistance to the mandate of *Brown*. Each move in the agonizingly slow process of desegregation has been taken unwillingly and under coercion. The evidence indicates as well the manifold respects in which the dual school system affects the lives of persons educated therein and the development of the society in which it exists. Some such effects will endure long after the dual system may have been abandoned. Attitudes of whites and blacks, employment, income levels, housing segregation, and the direction of urban growth are all permanently shaped by school segregation. To the extent that segregation endured past 1954, it fostered these effects by reason of the defendants' defiance of the announced constitutional mandate. The task of disestablishing the dual system may therefore be much more difficult in 1971. The defendants ought not to benefit from such self-imposed hardships.

Against this background the "desegregation" of schools within the city and the counties separately is pathetically incomplete. Not only is the elimination of racially identifiable facilities impossible of attainment, but the partial efforts taken contain the seeds of their own frustration. As before, and as courts have seen happen elsewhere and sought to prevent, racially identifiable black schools soon became almost all black; Richmond has lost about 39 percent of its white students in the past 2 years. Time and again courts have rejected half-measures as insufficient to fulfill school authorities' affirmative duty, well aware that otherwise the achievement will be only temporary. That school authorities may even in good faith have pursued policies leading to some desegregation and may in fact have achieved some results does not relieve them of the remainder of their affirmative obligation. *Clark* v. *Board of Education of Little Rock School District*, 426 F.2d 1035 (8th Cir. 1970). If the existing assignment program, be it by freedom of choice, a pupil placement system, residential zoning, or some combination thereof, does not, upon consideration of alternative means, work effectively to abolish the dual system, it is legally defective. *Green* v. *County School Board of New Keny County, supra; Davis* v. *School District of City of Pontiac*, *supra*, at 576–77 (6th Cir.), cert. denied. —— U.S. —— (1971); *Bradley* v. *Milliken*, *supra*. —— F.Supp.——(slip opinion at 21).

The institution within the three existing school districts of something which might in some other context pass for desegregation of schools is a phenomenon dating at best from the opening of the 1971–72 school year, which took place during the trial of this case. Prior thereto each system was in some respect nonunitary, and the Court is not fully advised as to the current status of the county system. Even were each existing system, considered in a vacuum, as it were, to be legally now unitary within itself, the question still remains whether a State policy having the effect of preventing further desegregation and foreseeably frustrating that which has been accomplished to date may be imposed upon a very recently achieved desegregated situation. Momentary unitary status—assuming it existed here, which has not been shown—will not insulate a school division from judicial supervision to prevent the frustration of the accomplishment. Courts require school boards to take action to prevent resegregation by various means. *Lemon* v. *Bossier Parish School Board*, 446 F. 2d 911 (5th Cir., June 17, 1971). See also, *Louisiana* v. *United States*, 380 U.S. 145, 156, where the Supreme Court in a 14th and 15th amendment case concerning voting rights speaks of a "need to eradicate past evil effects and to prevent the continuation or repetition in the future of discriminatory practices . . ."

It should be borne in mind that at the very least a fair interpretation of the burden placed by law upon those who by official action have created segregated schools is to utilize official action to desegregate them, as Mr. Justice Douglas has stated, at least until the force of the early segregation policy has dissipated.[15]

As the Court has already stated, school district lines within a State are matters of political convenience. The claim that the defendant counties have a right to keep their separate systems to be utilized solely by residents of the respective counties has little merit in the face of past discriminatory practices on the part of all of the defendants. Such a contention buttressed by the historical facts of gross discrimination against the blacks in almost all aspects of life, which have in the instant case proximately resulted in the white islands surrounding the city of Richmond, simply points up the immediate need for the relief sought. "Even historically separate school districts, where shown to be created as part of a statewide dual school system or to have cooperated together in the maintenance of such a system, have been treated as one for purposes of desegregation." *Lee* v. *Macon County Board of Education*, 448 F. 2d, at 752 (1971). The Chief Justice, speaking for the Court in *Swann*, *supra*, points out the need for judicial action where State agencies have deliberately fixed or altered demographic patterns. Such patterns as shown by the racial composition of the respective political subdivisions in this case are an inevitable result of State action.

The consolidation of the respective school systems is a first, reasonable and feasible step toward the eradication of the effects of the past unlawful discrimination. All that is required of the defendants is that they take affirmative action to maximize integration in all feasible ways to the end that there will be the immediate establishment of a unitary school system resulting, as the Court finds from the expert testimony adduced, in the opportunity for the plaintiff class to secure that to which they are constitutionally entitled—equality of education.

The Court's specific findings of fact, based almost entirely on uncontradicted evidence, amply support the relief prayed for. In the solution of the problem of school segregation, Federal courts have not treated as immune from intervention the administrative structure of a State's educational system, to the extent that it affects the capacity to desegregate. Geographically or administratively independent units have been compelled to merge or to initiate or continue cooperative operation as a single system for school desegregation purposes.

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[15] From opinion denying stay in *Guey Heung Lee* v. *Johnson, et al*, Supreme Court of the United States, No. A-203, October Term, 1971, 92 S. Ct. 14 (1971).

Although under governing precedents special deference is due a State's decision to adopt a particular organizational structure in pursuit of quality education, where adherence to any such plan is chiefly motivated by a preference for separation of the races, courts intervene to forestall any segregatory effect. Where the effect of maintaining a given organizational structure is to prevent the achievement of a substantially greater degree of actual desegregation otherwise attainable, school administrators must justify their decision by reference to predominantly nonracial educational motives. Cases outside this circuit have addressed themselves primarily to the issue of the racial effect alone, without regard to subjective intention, of creation or maintenance of separate school systems. However, in each such case where a search for invidious motive was undertaken, it was found.

The rearrangement of district boundaries where it will cause less than complete segregation has been enjoined where it would impede or frustrate the achievement of desegregation and no substantial State interest, save the desire to continue segregation, supported the change.

In *Burleson* v. *County Board of Election Commissioners*, 308 F. Supp. 352 (E.D. Ark.) *aff'd.* 432 F. 2d 1356 (8th Cir. 1970), the nearly all-white Hardin area sought to secede from the Dollarway school district; it had been made part of that district in an earlier consolidation move prior to *Brown*. The separation attempt followed desegregation decrees addressed to the entire area, but sentiment had been building for it beforehand. The trial court found that the effect on racial proportions in the district would not be insubstantial; the black percentage would go from 55 percent to 57 percent immediately, and further white flight could be expected. The court refused to permit the division in circumstances where it was readily inferable that the process of desegregating would be made substantially more difficult by the withdrawal of the Hardin area, and the change was at least partially motivated by a desire to escape integration. Motivation, however, was not the key to the *Burleson* court's decision; the crucial factor was the impact upon an area in the process of creating a unitary school system.

In *Aytch* v. *Mitchell*, 320 F. Supp. 1372 (E.D. Ark. 1971), an effort was made to divide by referendum a school district in the process of desegregation; if successful, the resulting independent districts would be nearly all-black and all-white. As in *Burleson*, secession sentiment had existed before a desegregation decree was filed, but came near fruition thereafter. The court determined that the division of the district was racially motivated and, regardless of motive, would almost completely impede segregation. Because of the impact of the separation on the local authorities' duty to desegregate the schools, the change was enjoined. *Id.*, 1377.

The city of Oxford, Ala., had had an independent school system until 1932, when its schools became part of the Calhoun County system. During the 1969–70 school year, when Calhoun County schools came under orders to develop a desegregation plan, Oxford established its own school system. Its new board of education consented to a county board proposal which entailed the receipt of blacks in its schools, raising their student bodies to about 20-percent black in population. The city was about 5 percent black. The plaintiffs suggested an alternative, involving sending some Oxford residents to formerly black schools rather than closing them. The district court ordered a zoning plan covering county and city systems, the substance of which is not here relevant.

The Fifth Circuit rejected Oxford's contention that its separate status entitled it to keep its students within city boundaries and upheld the district court's decision to treat the city and county as a single unit.

> We hold that the district court's approach was fully within its judicial discretion and was the proper way to handle the problem raised by Oxford's reinstitution of a separate city school system. The city's action removing its schools from the county system took place while the city schools, through the county board, were under order to establish a unitary school system. The city cannot secede from the county where the effect—to say nothing of the purpose—of the secession has a substantial adverse effect on desegregation of the county school district. If this were legally permissible, there could be incorporated towns for every white neighborhood in every city. . . . Even historically separate school districts, where shown to be created as part of a statewide dual school system or to have cooperated together in the maintenance of such a system, have been treated as one for purposes of desegregation. . . .
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> School district lines within a State are matters of political convenience. It is unnecessary to decide whether long-established and racially untainted boundaries may be disregarded in dismantling school segregation. New boundaries cannot be drawn where they would result in less desegregation when formerly the lack of a boundary was instrumental in promoting segregation. . . .
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> Oxford in the past sent its black students to county training. It cannot by drawing new boundaries disassociate itself from that school or the county system. The Oxford schools, under the court-adopted plan, supported by the city, would serve an area beyond the city limit of Oxford. Thus, the schools of Oxford would continue to be an integral part of the county school system. The students and schools of Oxford, therefore, must be considered for the purposes of this case as part of the Calhoun County school system. *Lee* v. *Macon County Board of Education, supra,* No. 30154 (5th Cir. 1971).

Soon thereafter another panel of the same court rejected the attempt of another Alabama city, Pleasant Grove, to create a "splinter" school district, physically within but administratively separate from Jefferson County, with the effect of thwarting the operation of a unitary school system. As in the *Oxford* case, no study of the motivations lying behind the separation was made; it was deemed irrelevant. Any limitation, the court said, citing *North Carolina Board of Education* v. *Swann*, 402 U.S. 43 (1971), on a school authority's discretion which worked to prevent its fulfillment of the affirmative obligation to operate a unitary system could not receive judicial recognition. *Stout* v. *Jefferson County Board of Education*, No. 29886 (5th Cir. July 1971).

One further decision by a State court established the duty of the

State's commissioner of education to prevent nearly all white Morris Township from withdrawing its students from the secondary school in Morristown, which it surrounded and which had a substantially greater proportion of black students. The two legal entities, the New Jersey Supreme Court said, realistically constituted a single community in fact, divided by arbitrary political boundaries. *Jenkins* v. *Township of Morris School District*, 279 A. 2d 619 (June 25, 1971). They were interdependent in most municipal services. Black residences, however, were located mainly in the town, where housing costs were lower. The town's school population was 39 percent black, whereas that of the township was 5 percent black. Nearby schools of the two jurisdictions had disparate racial enrollments, readily perceived by the community. Township students attended the high school in the town, about 14 percent black. If they withdrew as planned the black ratio would double immediately and continue to rise. A township referendum had supported separation rather than merger of school systems, and plans were set in motion to create a separate township high school.

The commissioner foresaw the creation of segregated school systems, but thought that he lacked the power to prevent it. The State supreme court emphasized by contrast the broad authority given the commissioner over the State's school system and the firm statutory policy against segregation. In addition the court reviewed analogous cases, such as *Haney*, *supra* and *Reynolds* v. *Sims*, *supra*, rejecting as barriers to the implementation of the equal protection guarantee existing political subdivision lines:

> This does not entail any general departure from the historic home rule principles and practices in our State in the field of education or elsewhere; but it does entail suitable measures of power in our State authorities for fulfillment of the educational and racial policies embodied in our State Constitution and in its enabling legislation. Surely if those policies and the views firmly expressed by this court in *Booker* (45 N.J. 161) and now reaffirmed are to be at all meaningful, the State commissioner must have power to cross district lines to avoid "segregation in fact," (*Booker*, 45, N.J. at 168), at least where, as here, there are no impracticalities and the concern is not with multiple communities but with a single community without visible or factually significant internal boundary separations. *Id.*, —— (slip opinion at 20).

The court adverted to a State-authorized program under which students might cross such lines for valid educational purposes and noted that the districts in question had used such a system. Administrative constructions by the State's central educational authorities of this pupil-exchange statute, which narrowed its application in favor of increased local power to terminate the program, were rejected, as had been earlier self-limiting constructions by the State officials. The New Jersey court concluded that the State commissioner in law possessed the power to prevent a termination of the exchange relationship whereby township residents were educated by the town. Furthermore, in the context of a single community divided into separate school districts, he was found to have the authority, in the power to withhold State funds, to direct a merger of the existing districts into one.

Courts have in other instances as well not merely forestalled the creation of new administrative units designed to enhance segregation, but have directed the reconstitution of existing districts so as to facilitate school desegregation.

In *Haney* v. *County Board of Education of Sevier County*, *supra*, an all black and an all white school district were ordered merged. Each separate district had its genesis in consolidations occurring during the pre-*Brown* era of compulsory segregation. The bounds of each were very irregular; indeed one was composed of noncontiguous sections. No explanation for the shape of the districts came to mind save one; their bounds followed patterns of residential segregation:

> It is readily apparent that the Sevier County Board of Education approved reorganization of districts along district lines which facilitated the segregated system of public education then required by Arkansas law. *Id.*, 924.

The evidence showed also that after the creation of the larger, segregated districts the few blacks resident in the white district were transported into the black district for their education.

Because the districts were formed under the dual system and in order to accommodate its operations, their continuation after *Brown* carried forward the effect of that policy and could only have the effect of perpetuating segregation. The *Haney* court relied in formulating relief on the statement in *Brown II* recognizing that the process of desegregation might well entail the modification of "school districts and attendance areas," *Brown* v. *Board of Education of Topeka*, 349 U.S. 300, (1955). The force of the mandate to desegregate requires sometimes the sacrifice of a degree of local autonomy in the formation and operation of governmental units; otherwise a State would be enabled to "evade its constitutional responsibility by carveouts of small units," *Hall* v. *St. Helena Parish School Board*, *supra*, aff'd. 287 F. 2d 376 (5th Cir. 1961).

The court directed that the districts on remand be consolidated. On a later appeal from the decree, the court of appeals held that the manner in which merger was effected would not be restricted to those mechanisms of consolidation provided under State law.

> Appellees' assertion that the District Court for the District of Arkansas is bound to adhere to Arkansas law, unless the State law violates some provision of the Constitution, is not constitutionally sound where the operation of the State law in question fails to provide the constitutional guarantee of a nonracial unitary school system. The remedial power of the Federal courts under the 14th amendment is not limited by State law. *Haney* v. *County Board of Education of Sevier County*, 429 F.2d 364, 368 (8th Cir. 1970).

Thus the administrative arrangement for a combined district was ordered altered from that fixed by Arkansas law, in order to provide for equal representation from the residents of merged segments.

In *United States* v. *Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), *aff'd. 447* F. 2d *441* (5th Cir. 1971), plaintiffs relied on the action and inaction of defendant State and local educational officials in permitting to continue intact a number of all-black school districts, survivals of the era of segregation. Those officials sued were empowered to bring about consolidation of the districts in question or were engaged in supervising and supporting them from the State level by the disbursement of State and Federal assistance payments.

The administrators of the black districts had

> arranged for, approved or acquiesced in an assortment of detachments and annexations of territory and student transfer and transportation arrangements which have had the effect of transferring students between administrative units so as to create and perpetuate all-black districts. *Id.*, 1048.

The State's central officials had approved these exchanges of students and financed them without giving consideration to constitutional requirements. By annexation or detachment white and black districts were kept separate. Transfer and transportation policies worked to the same end.

The court held that "separate neighboring or overlapping school districts, one black and the other white, are unconstitutional when created and maintained to perpetuate a dual school system." Id., 1050. Part of the de jure segregation found was traceable directly to the operation of the dual system. But the court deemed equally unlawful those segregated districts which resulted when "[b]y the isolation of racially homogeneous residential areas into formal political enclaves, district lines drawn prior to 1954 have entrenched segregation . . ." *Id.*, 1050–51.

Liability in officials with statewide authority was found where they "participated in the continued support of administrative units which were created under color of a State law requiring separate educational facilities or, at the least, were formed without regard to constitutional standards of equality." *Id.*, 1052. Fulfillment of their affirmative duty and that of local personnel to take such action as is necessary to eliminate the dual system could not be reconciled with continued operation of district lines which resulted in continued segregation. The court so held in the context of available State law mechanisms for the elimination by merger of the offending districts.

State officials were required by the Court to reorganize the districts with an eye to considerations of equal educational opportunity to cease permitting local officials to carry on policies which tended to foster segregation, and to enforce these new policies with the affirmative mandate of sanctions. After later hearings on the central authority's proposed plans, they were ordered to prevent transfers of students, changes in district lines, and decisions concerning transportation, extracurricular activities, faculty assignments, student assignments, or curriculum from promoting segregation and to back their policies with denials or accreditation and of State educational funds.

In other circumstances existing racially separate administrative units have been compelled to cooperate with others of overlapping jurisdiction or with districts located nearby for the purposes of achieving faculty and student desegregation, while continuing to exist as separate units for purposes of curriculum, administration and some financing. Consideration was given solely to the effect such a system would have as part of the effort to achieve desegregation. In

United States v. *Crockett County Board of Education*, No. 1663—Civil, mem. decis. (W.D. Tenn. May 15, 1967), seven independent school systems were directed to collaborate in order to implement a free choice plan and to desegregate faculties. In *Taylor* v. *Coahoma County School District*, 330 F. Supp. 174 (N.D. Miss. Feb. 12, 1971), separate State agencies operating racially identifiable high schools were ordered to act jointly as one board to desegregate the faculties of each by reassignment between the two facilities and to accept students from within the county on the basis of geographic zones. The existence of separate legal entities for administration was held legally insufficient to frustrate required desegregation of the facilities.

In *Robinson* v. *Shelby County Board of Education*, Civil No. 4916, (W.D. Tenn. Aug. 11, 1971), the district court ordered the joinder as defendant of the Memphis City School Board in order to desegregate county schools by pairing with a facility in the city system.

Further support for a court order directing the elimination of racially identifiable schools by means of cooperation between or consolidation of formally separate divisions of a State's schools system within a metropolitan area is given by *United States* v. *Board of School Commissioners of the City of Indianapolis, supra*. As in other jurisdictions the public schools in Indiana constituted a centrally operated State system. Moreover, several State agencies have historically pursued policies of repression toward blacks. Housing segregation enforced by private practices and State agencies was common through the years; as a result black housing reflected a pattern of containment. Schools, too, had historically been segregated, although a 1949 statute had apparently ordered the gradual abandonment of that policy. The Indianapolis board, however, by construction and assignment policies deliberately preserved racial separation. Zone lines were imposed on known segregated neighborhoods. In 1954 and in 1968 the outlines of the dual system of 1949 were still clearly visible, maintained by a great variety of manipulative techniques. As a result in 1968 a great number of identifiably black schools existed, and in a system with a 36 percent black student body, 88.2 percent of black elementary students were in majority black schools.

From 1954 through 1970 the black proportion of the district's population had expanded rapidly, whereas the expansion of white population took place primarily in Marion County outside the district. New areas of black housing grew primarily contiguously to existing black housing in the city's core. Changes in housing racial composition of various areas were rapidly followed by dramatic changes in the composition of local schools. In some instances the changes in housing patterns could be traced directly to the location of public housing projects.

Furthermore, the State legislature had by special enactment frozen the size for practical purposes of the Indianapolis school district, while permitting the city to expand for other purposes. Recently the government of the city and Marion County had been merged for all purposes except school operation. Left separate from the Indianapolis school system were 10 school units within Marion County, which units collectively had a school population of 73,205, 2.62 percent black.

The court therefore foresaw a process of accelerating advance of identifiably black schools, as resegregation took place in schools on the fringe of expanding black neighborhoods.

> [And] the entire central core of the involved city develops into a virtually all-Negro city within a city when, as in Indianapolis, the Negro residential area is largely confined to a portion of the central city in the first place. Id., — (slip opinion at 45).

Given the ability and inclination of whites to depart the jurisdiction of the defendants, and the likelihood that attempts to eliminate existing segregation within that restricted area would succeed only briefly, to be followed by resegregation, the court determined to consider exercising its broad equity powers to find a more lasting remedy. Nearby municipal and school corporations were joined as defendants in order to litigate the legality of their exclusion from the city system by special legislation and the necessity in any case of creating a metropolitan school district in order to relieve de jure segregation in the city.

Other courts have indicated that a modification of school district lines, including a consolidation of existing units, might be appropriate purely as a matter of relief from State-imposed school desegregation. In *Calhoun* v. *Cook*, Civil Action No. 6298, 332 F. Supp. 804 (N.D. Ga., July 28, 1971), the district court discussed at length the history of efforts to achieve the final desegregation of the dual system in Atlanta. During the pendency of the lawsuit the city's school racial proportions had shifted from 70 percent white to 70 percent black and the system's enrollment fell from 115,000 to 100,000 pupils. In 1970 the system lost 7,000 white pupils and gained 1,000 blacks. Areas of black housing shifted outward from the center over the years, 34 schools, some built since 1961, located along the line dividing zones of white and black residency in an effort to foster integration, rapidly converted to all-black occupancy. Twenty-nine schools built to serve federally funded housing were by 1971 mainly black.

The court attributed the failure to achieve lasting integration to housing segregation, but, in the absence of evidence to the contrary, determined that this was beyond official control.

In the absence of adequate facilities to implement a large-scale transportation plan, the court placed its hopes on a majority-minority transfer plan. Desegregation of each facility through transportation, the court feared, would only result in an accelerated departure of whites and the creation of an all-black school system; the very result *Brown* condemned. The court declined to order substantial further relief. As a result, of 152 schools, only 38 were left with student bodies made up of less than 90 percent of one race or another.

However, in a final section styled "Comment" the court noted that no serious attention had been given to the possibility of consolidating the city system with the independent one of Fulton County, in which Atlanta lies in part:

> In terms of efficiency, taxes, and quality education, such consolidations normally produce long-range improvements. In terms of the current problem, such consolidation might produce partial, even though not perfect, solutions. Certainly for many reasons connected with this case, this one aspect ought to be studied without delay. *Id., 809.*

The Court of Appeals for the Fifth Circuit reversed, directing the lower court to consider the merits of a desegregation plan being prepared by the plaintiffs. It further directed the district court to enter supplementary findings of fact and conclusions of law on the proposal to consolidate the city and county systems outlined in the lower court's "comment." *Calhoun* v. *Cook*, —— F. 2d —— (5th Cir., Oct. 21, 1971).

In *Bradley* v. *Milliken*, *supra*, the district court determined that State-imposed segregation existed in the Detroit schools. Public and private racial discrimination had created a pattern of complete racial segregation in housing throughout the city. On this matrix the school authorities had superimposed an attendance zone system managed in several respects in order to promote racial separation. The State's central school administrators, further, had withheld funds which might have been used to break up the patterns of racial separation, and the State legislature had attempted to block a voluntary city desegregation plan.

In its legal conclusions the district court stressed that the obligations imposed by the 14th amendment fall upon the State and observed that Michigan's central educational administrators have extensive powers over the State's educational system, including that of school district reorganization, and that State law provided mechanisms for annexation and consolidation of school districts. The court did not direct the joinder of further school districts as parties, however, pending submission of proposed desegregation plans by local and State officials.

Thus in the Oxford and Pleasant Grove cases, in *Jenkins*, and in *Crockett County*, the achievement of desegregation and the prevention of resegregation were found to override State policies which might embody a preference for school attendance within the district of residence. At the same time courts did not consider the policy of parental control over their children's schooling of such telling importance as to require, necessarily, the abandonment of separate districts as financing and administrative units; that question might be resolved as the State officials and their constituents might wish. In *Haney*, *Texas*, and *Burleson*, however, consolidation or maintenance of unified status was considered the appropriate remedy.

Our court of appeals recently decided three "splinter" district cases: *Wright* v. *Council of the City of Emporia*, *supra; United States* v. *Scotland Neck City Board of Education*, 442 F. 2d 575 (4th Cir. 1971); and *Turner* v. *Littleton-Lake Gaston School District*, 442 F. 2d 584 (4th Cir. 1971). In two of the three cases the court upheld the creation of a new, smaller district of higher white percentage than the area from which it was taken.

The rule which the Court adopted and by which the Court is presently bound, requires a two-level analysis. If the new area's population is sufficiently different in composition from that of the parent district to support an inference of an aim to perpetuate segregation, the change should be enjoined. If no such drastic change takes place, the Court must fully analyze the circumstances to determine whether the paramount motive for the realignment is to preserve segregation, or is related to valid non-racial educational goals.[16]

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[16] The judgment of this Court in the *Emporia* case was reversed by the U.S. Court of Appeals for the Fourth Circuit. This Court found the motives of city officials to be mixed, but concluded that the question of motive was not controlling and enjoined the city from operating a separate school system. The case is now before the Supreme Court of the United States, as is the *Scotland Neck* case.

In each instance of the three the new, small district had a student body about half black and half white. In *Emporia* the larger district changed from 66 to 72 percent black; in *Scotland Neck* from 77 to 80 percent black; in *Littleton-Lake Gaston* from 67 percent black to 72.5 percent black. In each case the change was assertedly made for the sake of providing better financing for the education of pupils in the withdrawn area. However, in *Littleton-Lake Gaston* the trial court found no such purpose in fact. Furthermore, in that case, the school district boundaries followed no preexisting political boundaries which might have been deemed "natural" and free from segregatory intention. Finally, the legislative history of the bill creating the *Littleton-Lake Gaston* district betrayed such a discriminatory purpose. The last secession therefore was enjoined.

In both *Emporia* and *Scotland Neck* the fourth circuit relied in particular upon the innocent nature of preexisting city boundaries as barriers which might legitimately be defended as the limits of assignment zones for small areas for which the State concededly had not yet succeeded in operating unitary school systems. The finding of nonracial purpose in creating and maintaining such zones appears greatly to have hinged upon this factor, which entails a number of unstated assumptions.

Before exploring those points, however, the Court reverts to the first stage of analysis: Does the effect alone of the lines' maintenance as assignment barriers support an inference of racial motivation? In the metropolitan area of Richmond the impact of the maintenance of school division lines is much greater than in the three earlier cases. The city system's racial composition would shift from over 65 percent black to about 33 percent black were a merger or other cooperative assignment plan adopted. The county systems at present are about 10 percent black; merger would more than triple this proportion. The evidence shows as well a history of county resistance to desegregation and to the aims of this lawsuit on racial grounds. This in fact is the attitude of those in the county and State hierarchies who have the power to permit or prevent consolidation.

That the dual level test of legality is applicable to mergers as well as secessions is illustrated by the citation in *Emporia* to *Haney*. The ample evidence that the Richmond area schools were maintained in segregated status as the city's black population grew, contained by private and public forces within the boundaries of the city as the area expanded, demonstrates that in this case the boundaries of the city in relation to the community have been maintained by State action in such a manner as to include the greater part of the black population of the area. *Brewer* v. *School Board of City of Norfolk*, *supra*. On the primary analysis, therefore, an intention to preserve segregation or minimize desegregation is shown.

But further analysis indicates the speciousness of the conclusion that separate city or county status carries with it an explanation for the desire to remain separate for school attendance purposes. The record in this case, unlike that in *Emporia*, contains substantial evidence concerning the regard in which the State of Virginia and its central and local officials have held such political boundaries. Never until recent history have such boundaries been deemed barriers to student assignment. The separateness of political subdivisions as units of school administration might well be thought built upon a desire to preserve funds locally raised for the education of children of the locality [17] and to maintain for parents of the subdivision a voice in the administration of their children's schools. Thus it might be thought that the retention of school divisions coincident with political subdivisions indicated a dominant purpose to serve such goals.

Yet in fact throughout the State and in the Richmond area political subdivision lines have been ignored when necessary to serve public educational policies, including segregation. State law has permitted, encouraged, and even compelled such practices. Henrico and Chesterfield school authorities through the years have employed some tuition arrangements whereby their students were educated elsewhere and have unhesitatingly explored others. All three jurisdictions, of course, participated in the tuition grant and pupil scholarship programs. All three jurisdictions continue to engage in the operation of specialized joint programs.

Cooperative activities—voluntary and centrally imposed—have gone on in what is in practical terms a single community. The political subdivision lines have no significance by educational standards and have been ignored on several occasions to serve the ends of segregation. Such was the similar case in *Haney*, *Texas*, and the *Oxford* case, where merger or the disregard of district lines was ordered.

It is essentially a State created system of local government of schools which is offered up as a justification for maintenance of separate attendance areas. The asserted fixed policy of retaining political subdivisions as units of assignment does not exist, upon examination. The interests served by the policy favoring local control time and again have been sacrificed to other educational ends. It is significant that in this case the school board of the city of Richmond, which must well know the necessity *vel non* of separate operation for purposes such as financing and curriculum control, fully supports the plaintiff's prayer for combined operation. Moreover, the reality of defendants' objections fades when one considers that urban government experts have studied the area extensively, noted the intensity of the prevailing segregation, and recommended a cooperative solution.

From the insubstantiality of nonracial reasons for adhering to political subdivision boundaries as attendance limits, the Court infers that insistence on such a policy must be predicated on its known racial effects. A purposeful, centrally compelled policy of segregation persisted in Virginia for many years; its effects endure today and affect the racial characteristics of the schools. Its abandonment has been gradual, piecemeal, and intentionally reluctant and is less than total today. No administrator can plead ignorance of these facts. At the same time, by means of repeated internal and outside surveys, reports, and recommendations, the magnitude of the problems of the depth of discrimination and its impact and the means to begin to alleviate it were presented to official bodies with the power to act. When their response was inaction or even contrary steps, it cannot be said that they acted without the intention of infringing constitutional rights. Informed of the consequences of past discrimination, they knowingly renewed or entrenched it. "[I]t was action taken with knowledge of the consequences, and the consequences were not merely possible; they were substantially certain. Under such conditions the action is unquestionably willful." *Keyes* v. *School District Number One, Denver, Colorado*, 301 F.Supp. 279 (D. Colo. 1969); See, *Bradley* v. *Milliken, supra; Spangler* v. *Pasadena City Board of Education, supra; Davis* v. *School Board of City of Pontiac, supra.*

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[17] See *Serrano, et al* v. *Priest, supra,* (Supreme Court of California).

NEED FOR IMMEDIATE DECREE

That the constitutional rights of the plaintiff class cannot be subverted by the maintenance or desire to preserve county or city boundary lines is obvious. As the Court has pointed out, the maintenance of such lines has never been an impediment when used or maintained to subvert constitutional rights. See *Sims* v. *Amos*, C/A 1744–N (M.D. N.Div. Ala. Jan. 3, 1972).

Not only is meaningful integration in a biracial community, such as we have here, essential to equality of educational opportunity, but it is required by the Constitution of the United States.

Public education, in this day and time, is perhaps the most important function of State and local governments. See, *Brown I, supra*, page 493.

In 1868 the 14th amendment to the Constitution was adopted. The purpose of the adoption of the 14th amendment, coupled with the 13th and 15th, was to remove the race line from our governmental systems. In effect, these amendments affirmatively required "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." See dissenting opinion. *Plessy* v. *Ferguson*, 163 U.S. 537, at 556 (1896).

The basis of all prior decisions in school cases, at least since *McLaurin* v. *Oklahoma State Regents, supra*, and *Sweatt* v. *Painter, supra*, is that dual school systems are impermissible for they cannot provide equal protection of the laws. The principles enunciated in *Sweatt* and *McLaurin* were said by the Chief Justice in *Brown I, supra*, page 494, to apply with added force to children in grade and high schools. The Court spoke of "those qualities which are incapable of objective measurement. . . ."

Here, the educational experts in whom the Court has confidence point out that the plaintiff class, by reason of the acts of the defendants, or in some instances the failure of acts on the part of the defendants, are handicapped in their pursuit of education. The quest for equality or educational opportunity for Negroes has been going on for these many years without complete fruition, which is all the more grievous when one examines the clear and cogent language of the 14th amendment to the Constitution of the United States and the pronouncements of the Supreme Court from as early as 1938.[17a] The very purpose of the 14th amendment was to do away with discrimination between our citizens, and especially in those matters which are of fundamental interest.

[17a] See *Missouri ex rel Gaines* v. *Canada*, 305 U.S. 337 (1938)

The overwhelming evidence before this Court is to the effect that in a biracial community, as here, meaningful integration is an essential element of securing equality of education.

An analysis of the testimony of those experts who were called on behalf of the defendants shows that the primary objection arose from a fear engendered by the obvious need for financial stability. Indeed one witness, Dr. Hooker, upon being asked, "What is the importance to the maintenance of the high-calibre school division or school system of consistent financial support?", answered, "Well, everything depends on it." As the Court has previously pointed out, financing has not been an obstacle when consolidation of school systems was desired, nor is it anticipated to be so in this case.[17b]

If there is to be public education it must, under the Constitution, be afforded to all on an equal basis.

It is indeed a sad commentary that by reason of the tenacity with which State and local officials have clung to the ways of the past in an effort to keep the races apart in one of the most important functions of government, i.e., the education of our children, that thousands and thousands of words have been written in judicial literature, when to this Court the following language, interpreted in the manner in which it was intended to be interpreted, that is giving effect to the ordinary meaning of the language contained therein, bespeaks it all:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Section I, 14th amendment to the Constitution of the United States.

While the Court has concluded that under the circumstances existing the work of Dr. Little in formulating the metropolitan plan was exceptional, the Court is likewise satisfied that with the cooperative efforts of the other educators within the proposed metropolitan plan, perhaps an even better plan will emerge.

The Court feels it necessary, however, not to await any proposed modifications, but to order the plan to be implemented to the end that a metropolitan school system will be in effect for the commencement of schools in September 1972.

History shows that it is only since the mandate of *Green* that there has been any discernible response in Virginia to the eradicating of unitary school systems. In most instances any action taken has been done under threat of financial loss or court action.

We have, in the instant case, a situation wherein one of the witnesses has already been subjected to abuse, a political leader who speaks of revolt, another school administrator who by his suggestion that we would be better off if we could forget the past evidences to the Court, a lack of understanding that the present is simply a culmination of the past and, unless affirmative action is taken, a prophesy of the future.

[17b] See *Serrano* v. *Priest, supra,* and *Rodriquez* v. *San Antonio Independent School District,* C.A. No. 68–175-SA (W.D. Tex., Dec. 23, 1971).

While the president of the State board has recommended consolidation as a solution of some of the problems faced by smaller school districts, and while he was willing to endorse integration as a desirable educational goal, his endorsement was tempered to the extent that this should be done so long as it is not, in his terms, "disruptive." In addition he added the proviso that it should have the support of the community at large. He, as well as the political leader who gave voice to suggestions of revolt, may well have, in their views, been responsive to the community. It is the Court's view that the burden will be lessened somewhat on all of the defendants, at least insofar as they are concerned with what they perceive to be the community response, if the actions taken in implementing the metropolitan plan are done so by mandate of this Court. Indeed the Court decrees it its duty and responsibility to so do.

It should be pointed out that the Court in considering the testimony of the experts gives greater weight to those experts whose opinions were to the effect that equality of educational opportunity would flow from the consolidation of schools in the metropolitan area, and that the proposed plan is both reasonable and feasible, than to the testimony of those whose opinions differ. In considering the weight to be given to the testimony of all of the witnesses, the Court has considered their qualifications, experience, interest or lack of same in the outcome of the litigation, their bias if any, as well as their actions upon the witness stand, and the weight and process of the reasoning by which they supported their respective opinions and testimony, and all other matters which served to illuminate their statements.

The Court makes the following additional findings of fact as supplemental to its general findings of fact heretofore stated.

STATE INVOLVEMENT

The general supervision of the school system of the State of Virginia is vested in the State board of education, which has the power to adopt bylaws for its own government and to make necessary rules and regulations for the management and conduct of schools not inconsistent with law. Virginia Code sections 22-11, 22-19 (1971 Cum. Supp.).

The State board of education establishes by regulation the duties and powers of division superintendents.

If a local school division delays beyond a certain date in appointing a superintendent, the State board intervenes and appoints one. On May 23, 1969, the board appointed superintendents in Chesterfield, Fairfax, and Prince Edward Counties, and the city of Colonial Heights.

The State of Virginia is divided into school divisions which report achievement test scores of their respective pupils to the board.

The State board establishes standards of teacher certification and precludes any school division from employing a teacher without such a certification, save when exceptions to the overall rules are made to meet emergencies. The control of that situation rests with the State board. The board maintains a list of personnel eligible to be appointed as division superintendents, and has taken action to do so where local school divisions have delayed such appointments.

For the school year 1941–42 the board issued regulations reference State funds to school divisions paying salaries to supervisors of instruction and directors of instruction in black and white schools.

In the early 1940's the State superintendent of public instruction participated in the creation of specialized libraries for black schools. supported in part by local contributions, private funds, and State appropriations.

The board in 1949 authorized a contract for purposes of providing medical and dental training for black Virginia residents. The quota for the State was not to exceed 24 students per year.

At least for the last 30 years the State superintendent has issued memoranda to division superintendents setting forth in detail changes in State law concerning the operation of schools. The State board has considered and endorsed proposed changes in the school laws of the State. It has conducted through its various officials conferences for school principals. In 1962 such conferences were held, the theme of which was "Today's Challenges in Secondary Education." White secondary school principals were to meet in one section of the State and Negro secondary school principals in another.

The State compulsory attendance law became effective June 28, 1968. On July 17, 1968, division superintendents were advised of this change in the law by superintendent's memorandum. On February 13, 1969, the assistant superintendent of public instruction advised division superintendents of emergency school legislation passed in the recently concluded January 1969 special session of the General Assembly. These included the repeal of compulsory attendance law and the provision for tuition grants.

Regional meetings for certain teachers and conferences have been held under the auspices of the State department of education and have been segregated by race.

At least through 1966 the State board administered scholarships financed by an endowment providing that the income from which was to be used in awarding scholarships to worthy white male students, born in Virginia and residents of Virginia, to attend colleges. A member of a three-man committee for regional scholarships concerning the awarding of said scholarships was the then division superintendent of schools from Chesterfield County.

School boards are required to report recommendations to the State board of those extracurricular activities which they believe should be carried on in the schools.

The State board's finance committee has exercised its authority to grant from its discretionary fund sums of money to Prince Edward County upon the reestablishment of a public school system in Prince Edward County, the schools of which had been closed for 5 years.

The State legislature has given the State board of education the power to prescribe standards of quality for education for the State's school divisions and they have established standards of quality.[18] For some years past the standards have been fixed for the accreditation of schools, certification requirements for teachers, and standards for new school construction or additions.

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[18] Va. Code § 22.19.1 (1971 Cum. Supp.)

Under standards recently adopted, it is required as to each school division that "the percentage of the student population achieving at or above grade level norms or the equivalent as measured by approved standardized achievement tests, will equal or exceed the mean ability level of the student population as measured by appropriate scholastic aptitude tests."

Under present law, as interpreted by the superintendent of public instruction, the general assembly is enpowered to fix, for each school division, the amount required to be appropriated in order to maintain state-mandated standards of quality education.

Under the procedures of accreditation formerly in effect, if a school was below standard, the State board would so indicate to the local school authorities and would assist with its staff the local school board to bring the school up to par.

If a school division fails to meet the qaulity standards fixed by the State board, it is so reported to the general assembly.

If a locality does not provide that amount of financial support which is required by the General Assembly, then the State Board of Education commences legal procedures, through the attorney general of the State, leading to a court order compelling local officials to raise the necessary funds.

The president, currently, of the State board of education is Preston C. Caruthers. The budget which the board has proposed to the general assembly for the next biennium is approximately $1.3 billion. Among the programs recommended for adoption are the provision of free textbooks at the elementary school level, an increase in elementary-level counsellors, and an emphasis on kindergarten programs.

Of some 871 million dollars received by school divisions in 1969–70, 91 million were from Federal funds and 250 million were from central State funds, of which about 25 million were disbursed pursuant to rules and regulations of the State board of education. Other State disbursements handled by that authority are governed by formula set out in an appropriation act.

The State board of education has in the past adopted teacher education programs, programs in inservice training of teachers, special education programs, and others designed to increase the quality of education in the State. In addition, the State board has adopted the policy of requiring a kindergarten program in all school divisions by 1974.

The State board has administered for many years the literary loan fund for school construction.

In August of 1971, the State Department of Education distributed the State's school divisions a bibliography of ethnic studies material. Its preface reads in part, "an important task for the public schools in Virginia is to provide in interdisciplinary, intercultural educational programs from kindergarten through grade 12, which builds understanding of peoples and American diversity."

The board has been and is now charged with the duty of administering accreditation standards applicable to private as well as public schools. In the opinion of the president of the State board, which the

Court accepts as a fact, the loss of accreditation by a child's school would be detrimental to the school and to the child as well. Accreditation standards are fully within the control of the State board, and a denial of accreditation is a substantial sanction.

In 1971, the State legislature gave new authority to the State board of education to license proprietary schools.

In April of 1971, the State board of education, with reference to schools within the State, declined accreditation in some cases, accredited some with a warning, and gave unqualified accreditation to others. Standards for accreditation are continually becoming more stringent.

School site selection has been subject to review by the superintendent of public instruction. School site selections, transportation policy decisions, assignment of teaching and academic-support personnel have not been made by the respective local school boards independently of central authority. The State board of education has provided services to develop, as it did extensively in Henrico, bus routes down to the finest detail. This is not to speak of the State board's execution of policies designed to bring about the transfer of students from one school division to another. Teacher certification has been the province of the State. Likewise, the State has assigned division superintendents and reviewed proposals for the hiring of visiting teachers and study supervisors. The State board sets the basic salary of school superintendents.

The minutes of the Henrico County Board of Education points up the dependency of school divisions on the State Department of Education. For example, in 1956 the board authorized its chairman to apply to the State board of education for financial assistance in the operation of a free textbook system provided by Virginia law.

The State board of education in July 1957, at the request of the division superintendent of schools of Henrico, submitted to the Henrico School Board the results of its study of white school transportation needs for Henrico. The report prescribed the specific routes to be followed by each bus. Interestingly, the report recommended the average daily mileage per bus to be around "40."

In 1964 the State board of education had authority to condition State reimbursement of salary of a visiting teacher upon compliance with its credential requirements.

Henrico County in 1969–70 received the following distributions from State funds: Basic State school fund, $6,088,556; driver education, $67,204.57; foster home children, $53,675; general adult education, $1,980; guidance counselors, $77.400; inservice training, $16,642; local supervision, $38,400; pupil transportation, $267,838; special education, $184,535.33; summer schools, $42,432; supervising principals, $29,316; teachers' sick leave, $31,676.24; educational television, $38,895; vocational education, $306,765.18. The total is $7,245,315.32.

It is the practice of Henrico's school administration to honor any request from the State department of education.

On the request of the school board, the Chesterfield County Board of Supervisors approved the introduction of an adult education program, 90 percent of the cost of which would be met by the State.

On April 12, 1961, the Board of Supervisors of Chesterfield County joined in the school board's request addressed to the State board of education that the county of Chesterfield be designated a separate school division.

Henrico County's educational budget for 1970–71 was $28,283,905. The total county budget that year was $57,146,586. Roughly one-third of the county's total budget comes from State and Federal funds.

Chesterfield County received in State funds during the 1969–70 year the following amounts: Basic State school fund, $5,951,637; driver education, $64,421.02; foster home children, $45,957; general adult education, $1,080; guidance counselors, $60,330; inservice training, $15,544; local supervision, $34,770; pupil transportation, $301,602; special education, $93,975.80; summer schools, $25,500; supervising principals, $22,218; teachers' sick leave, $36,735.57; educational television, $35,374.65; vocational education, $140,756.36. The total State funds received was $6,829,901.40.

Annually, the system receives from the Federal Government $624,883.

During 1969–70, the city of Richmond received the following amounts in State funds for education: Basic State school fund, $6,460,596; driver education, $45,774; foster home children, $55,823; general adult education, $13,362; guidance counselors, $104,640; inservice training, $24,821.25; local supervision, $47,280; pilot studies, $13,641.87; pupil transportation, $16,005; special education, $530,320.90; summer schools, $43,575; supervising principals, $40,722; teachers' sick leave, $42,323.47; educational television, $48,738.75; vocational education, $616,948.62. Total State funds for that year were $8,104,571.86.

School Divisions

Both before and after 1954, school divisions were created or dissolved by action of the State board of education.

In the minutes of the State board of education for August 24–25, 1944, the following appears:

> The Superintendent presented a long-range plan for the consolidation of school divisions with a view to greater efficiency in the administration of school affairs. This plan would call for the creation of between 50 and 60 school divisions in the state to replace the present 110 divisions, and would involve the creation of division boards of education, the membership of which would be based upon the school population in the counties, or in the counties and cities, comprising a division. The board looked with favor upon the general plan, subject to the working out of details.

While the State board of education never imposed single division status upon two political subdivisions if those subdivisions did not wish to be so combined, the State board did not, however, always consent to the dissolution of a school division comprising two political subdivisions, even though the school boards of each political subdivision might so request. On January 24, 1947, the State board declined to separate the existing school division of King George and Stafford Counties, despite the request to do so of the Board of Supervisors of Stafford County. The school boards of each county desired to continue the existing arrangement. The State board expressly acted in consistency with "the established policy of the board to recommend larger units of administration."

On application of the school boards and boards of supervisors involved, the State board of education realined school divisions among six Northern Neck counties. When citizens of Gloucester County protested, the State board refused to reconsider its action.

The board appointed a committee in 1952 to consider the separation of Prince George County from the city of Hopewell, the two then comprising one school division. Upon the committee's recommendation, no action was taken.

On April 23, 1953, the State board of education established Alleghany County and Covington City as a single school division. Records show that this was in accord with resolutions submitted by the school boards of each political subdivision. The positions of the governing bodies of these political units are not recorded. On the same day, Charles City County and New Kent County were established as a single school division, in accordance with requests by both school boards, although James City County had been part of the division, but again the State board minutes do not indicate the boards of supervisors' views. At the same time, James City was combined with the city of Williamsburg, subject to the completion of arrangements by the two school boards.

The school division of Warwick City and York County was abolished, and each political entity was made a separate school division in 1955, subject to approval by the legislative body of each subdivision.

In March of 1957, when so requested by the school boards and boards of supervisors of Amelia and Nottoway Counties, the State board of education abolished a joint school division comprising the two counties and created a single school division for each.

On February 25 1960, the State board of education resolved that a new school division of Halifax County and the city of South Boston was created. The minutes show that the school boards of each political subdivision requested such action. Nothing is stated concerning the governing bodies of either subdivision.

In March 1962, the governing bodies and school boards of Franklin City and Southampton County requested the formation of separate school divisions for each. The State board of education took no action on the request. "Concern was expressed over the further establishment of small school divisions, and Dr. Wilkerson was requested to suggest to the local school officials that the matter of the possibility of operating the schools for the city and the county under section 22–100.1 of the code be carefully explored." Effective July 1, 1962, the State board of education divided the school division comprising the city of Franklin and Southampton County into two school divisions.

Upon application by the boards of supervisors and the school boards of Lexington and Rockbridge, in 1966 the board created separate school divisions for each. Action was taken after a presentation by Lexington residents, including the factors of school population, minimum school size, and the city's willingness to accept county pupils in its high school on a tuition basis.

In 1968, the State board declined to separate the Gloucester, Mathews County school division. Both the board of supervisors and the school board of Gloucester County had requested separation. However, the Mathews County school board opposed such a move. The State board found that separation of the school division "might not at this time be in the best interest of the children of the two counties." (RSBX 82, at 19). However, effective July 1, 1969, the State board, in January of 1969, established separate school divisions for Gloucester and Mathews Counties. The State board, in its minutes, summarized its policies on the point of division consolidation:

> The State board of education is convinced that the size of an administrative unit is usually a major factor in determining the scope and quality of the instructional programs and related services. Certain operating economies are also often related to size and total pupil enrollment. The State board, therefore, has favored in principle the consolidation of school divisions whether they viewed creating administrative units appropriate to modern educational needs. The board regrets the trend to the contrary, pursuant to which some counties and newly formed cities have sought separate divisional status based on political boundary lines which do not necessarily conform to educational needs.

The board related that, although State law empowered it to create and dissolve school divisions, still the operation of schools at a local level is within the control of the city and county school boards of supervisors or city councils. Under this arrangement, "it has been impossible for the State board of education to effectuate a satisfactory consolidation program or even to assure that school divisions consisting of more than one political subdivision would operate in a manner which effects economies or results in genuine educational benefits." In the light of the failure of Gloucester and Mathews Counties to develop cooperative programs, the State board concluded to separate them.

On January 3, 1968, the State board of education resolved that, "effective consolidation of school divisions is a prerequisite to quality public education in many areas of the State." To this end the board recommended some changes in the outstanding law. "The board emphasizes the need, in any such plan, for adequate provision for the financing of consolidated school divisions, and urges early consideration of such constitutional and statutory changes as may be necessary to provide for effective consolidation and financing of the school divisions."

On February 7, 1969, the State board considered the request of Bedford County School Board and Bedford City Council to establish a single school division comprising the county and city. The county school board specifically requested that no action be taken which might interfere with efforts of the county to educate children of the city under a contract system. "Dr. Wilkerson observed," the minutes relate, "that the establishment of one school division would certainly be in accord with such efforts." The board so acted.

On request of all official bodies involved, the board dissolved the school division composed of Richmond and Westmoreland Counties and established separate school divisions for each. Action was taken after an explanation of the minimal cooperation existing between the two counties.

Lancaster and Northumberland County School Boards, in March of 1969, petitioned for separation also. The board refused to act at the time, in the light of the history of cooperation, the failure of the board of supervisors to take a position, and the divided community sentiment. At its next regular meeting it was learned that the legislative bodies joined in the request. The board inquired of opposition among black residents to the separation, and the delegation stated that apparently this was not a real factor, after further understanding of the problem. The delegation submitted a position paper to the board which gave as one reason for the separation that additional efforts would have to be made by school authorities in the near future because in 1970 both counties were "faced with total desegregation." The board ratified the separation.

At the State board meeting of August 19–20, 1969, discussion was had as to the separation of the city of Emporia from the combined Emporia-Greensville County school division. The city officials proposed it, but the county school board opposed the move. The city children were then educated by the county school board under contract. City officials represented to the State board that, after a recent school desegregation decree of this court, they feared the county would not be able to provide for city children an acceptable level of education. Apprehension was also expressed that unless a separate school division were established, city children would be bused to county schools rather than permitted to attend the nearest school. The common school division had been established only 20 months before, over the objection of the county board of supervisors. Efforts to create a joint school system were fruitless, however, and the contract terms unsatisfactory. The city recognized that the State board's policy discouraged the creation of small school districts, but stated that separation in this case would foster quality education. The State board denied the request, pending Federal litigation. This action signifies that common division status was considered by all to have an impact not only upon the administrative structure but on the attendance patterns as well.

Currently the city of Fairfax and Fairfax County are separate school divisions, each with its own superintendent. They operate together pursuant to a contract, with the county educating the city children.

Section 22–100.9 of the Virginia Code provides that in the event a consolidated school division is created, operating costs and capital outlays shall be shared on a prorata basis on enrollment of pupils, or on another basis agreed to by participating political subdivisions. The State board of education never specifically recommended repeal or modification of this statute. This section was first enacted in 1954 and dealt with expenditures for capital outlay and incurring indebtedness for construction of school buildings. A 1956 amendment added "local operating costs." In 1957, while the creation of a consolidated school division embracing the city of Covington and Alleghany County was under consideration, the attorney general of Virginia ruled upon the validity of a method of meeting capital and operating costs other than that set forth specifically in section 22–100.9. He stated that it was permissible for the political subdivisions to share such costs as to each school facility according to the number of residents of each subdivision educated in that school. Rep. Atty. Gen. 240 (1957).

In December of 1962, the attorney general of Virginia endorsed a financing plan agreed upon by the school boards of Washington County, the town of Abingdon, and the city of Bristol, whereby the city board would be reimbursed by the other two boards for the capital costs of enlarging the Douglas High School in Bristol. Douglas had, since 1948, served as a central high school for Negro residents of the three areas, and it was proposed to expand the program. The State's chief legal officer held that capital outlay and debt service might be charged against Washington County and Abingdon according to attendance by residents of each. Rep. Atty. Gen. 230 (1962).

The State board of education has never promulgated regulations setting forth the financial plan of operation of schools within a consolidated school division as contemplated by Virginia Code section 22-100.8 (1969 Repl. vol.).

The State board of education has a policy wth respect to consolidation of school divisions; in general, it has been to encourage the consolidation into a single school division of two or more sparsely populated rural counties. This policy would not be directed toward the consolidation of the city of Richmond or school divisions of its size and the two counties in issue here.

On April 23, 1971, the State board chairman appointed a three-member ad hoc committee to consider the division consolidation of the schools of Buena Vista, Lexington, and Rockbridge County, and of other localities requesting such assistance.

The policy of the State board of eductaion to encourage consolidation of school divisions has not been addressed to solving problems of desegregtaion.

The amended State constitution gives the State board of education the power to divide the State into school divisions subject to criteria and conditions established by the general assembly. This last qualification was not recommended by the commission on constitutional revision nor was it proposed by the State board of education. It had its genesis in the general assembly. A State school official testified that it was his assumption that the legislature was conscious that the language that they inserted could have an effect on this Federal litigation.

Section 22-30 of the Virginia Code was amended, effective July 1, 1971, during the pendency of this lawsuit, and after the motion for joinder had been granted. Pursuant to this recent legislative action to implement the provisions of the amended constitution, the State board of education was divested of the power to create, without local consent, school divisions comprising more than one county or city, or so to divide any county, with certain exceptions made for existing special town districts, each of which had its school boards.

New code section 22-30, setting forth the general assembly's criteria, limits at least provisionally the State board's power to place two political subdivisions in one school division; it may not so act without the request of the school boards affected and the concurrence of the governing bodies of the counties, cities, and towns affected.

In late 1970, Chairman Crockford of the Richmond school board predicted in a letter to the mayor of the city of Richmond a move, originated by the counties, to alter school division alinement statutes. This prediction, a State school official testified, and the court agrees, came to pass. The same official testified that, in practice, when the

State board of education created a single school division comprising two counties or more, the school board of each county would continue to operate its own schools. Twenty-eight such school divisions have existed in the past. Some of these continue still as single school divisions because the political subdivisions of which they were composed have been merged. However, those common school divisions shown on State board exhibit 10 as in existence as of the date of discovery, in fact no longer exist. For, as shown in superintendent's memorandum No. 6058 of June 29, 1971, the State board of education established school divisions within the State, effective noon, July 1, 1971, with the effect of separating political subdivisions formerly comprising a single school division. Essex and Middlesex Counties are now separate school divisions, as are King and Queen and King William Counties. James City County and Williamsburg City are now separate school divisions. Halifax County and the city of South Boston have been divorced. The State board of education has made Emporia City and Greensville County separate school divisions, although the court takes judicial notice that the litigation concerning the common operation of schools of that city and county has not concluded. Salem and Roanoke Cities are now separate school divisions, as are Bedford City and Bedford County. Furthermore, Green and Madison Counties and Rappahannock and Warren Counties have been dismantled as common school divisions.

Significantly, the same memorandum notifying division superintendents of the creation of new school divisions within the State, advised them concerning the procedures to follow should two or more school divisions desire to employ the same person as superintendent. Such a practice requires the approval of the State board.

On May 28, 1971, the State board, in response to the enactment of an amended sections 22-30 and 22-37, issued new recommended formulas for the computation of salaries of division superintendents serving part time for two or more school divisions.

A State school official stated that 17 common school divisions were dissolved by the State board of education on request. If this figure is gleaned from the State board exhibit 10, it is out of date; as noted, effective July 1, 1971, several other common school divisions were separated.

The three political subdivisions principally in issue have been separate school divisions since 1871 at least. In 1971, however, the State board of education took action pursuant to the revisions of the Virginia constitution and new statutory enactments, to divide the State into school divisions; at that time, it declared Richmond, Henrico, and Chesterfield each to constitute a single school division.

SELF-IMPOSED RESTRICTIONS

State school officials' testimony illustrates that many of the restrictions circumscribing the powers of the State board of education were essentially self-imposed. These would take the form of policy, not committed to writing save as they are reflected in the minutes related to particular office actions, or of regulations drawn by the State board of education itself. Mr. Blount of the State office testified that it was his understanding that the State board of education "interpreted" its powers, so that before a combined school division could be ordered there had to be requests for such action from the localities involved. The evidence shows that even with such requests, the creation of a single school division would not be automatic. The State board of education often took into account factors other than the economies involved in hiring a single superintendent. Often they appeared to have considered the impact, apparently a real one, that single division status had upon efforts to enter into joint or cooperative programs.

According to Blount, the State board of education never declined to place two political subdivisions in a single school division when so requested.

Blount stated that even assuming Richmond, Henrico, and Chesterfield officials requested and obtained status as a single school division under prior law, the only result of such action would be that the three would retain a single superintendent in common, and each school board would continue to operate its own schools. The court does not accept this essentially legal conclusion as the definitive statement of the powers or duty of local school boards and the State board of education under such circumstances.

The county and State defendants assert that when the State board of education has designated two or more political subdivision as a single school division, "in every such instance the schools in each county and city remained under the exclusive management and control of the separate school board of each such county and city." That this is not the case is demonstrated by the several examples of the coincidence of common division status and the use of such cooperative techniques as the operation of joint schools or the provision of education to children of two political subdivisions by one of them under a contract. The State board of education has recognized that common division status will at the very least encourage such efforts.

The counties and State ask the court to rule that the boundaries of the three political subdivisions in question have not been maintained for racial purposes. This is a school desegregation case, and therefore, in this action, when the court considers the establishment or maintenance of political subdivision boundaries it is mainly for the purpose of testing their impact upon school segregation. Seen in that light, the existing boundaries between the city and the two counties have been maintained for racial reasons, in one sense, at the very least. What is important here is that they separate not the city and two counties, but three school divisions. The evidence shows clearly that the one power body in the State government with the authority to modify school division lines has shied from that option whenever desegregation might thereby be brought about. Scrupulously the State board of education has avoided incorporating into its policy, which, in some instances, expressly favors the consolidation of school divisions, any notions of bringing about a greater degree of desegregation. Such a policy obviously must have the natural, probable, and eminently foreseeable effect of stifling the desegregation process. The president of the State board of education stated in open court that integration was if not the most important issue in education today, at least one of them. Yet, when crucial policy decisions are made by the State board of education, as in formulating requirements for quality of education, or establishing policing concerning school division, consolidation, or in promulgating regulations on the construction of new schools, or in dictating guidelines to local officials concerning the exchange of students between school divisions, the eyes of the State officials have been scrupulously averted from the irrefutable reality that each of these decisions will have a wide impact upon the degree of desegregation existent in the schools of the Commonwealth.

SCHOOL CONSTRUCTION

In February of 1947, the State board of education issued a policy statement concerning school consolidation. This paper reads, in part, as follows:

> It is the policy of the Virginia State Department of Education to render assistance to the local school divisions in developing an adequate program of education as follows:
>
> 1. Upon request of the local school board to provide survey services of buildings and transportation needs and to recommend specific consolidations where practical in keeping with a regulation of the State board of education which provides that when a social division plans to erect buildings, in submitting plans and specifications for approval, it must first determine its school building needs through a long-time planning program of not less than 10 years based upon a careful education study of the division and that such a school survey and long-time planning program shall be definitely determined before beginning the plans and specifications.

After a 1948 survey of the school building needs of each locality, the general assembly created a State school construction grant fund, known as the battle fund. In order to participate, a school division was required to project its future building needs for at least 4 years.

Under a regulation distributed to division superintendents in 1949, governing approval of new school construction, the superintendent of public instruction asserted his competency to approve or reject the construction of new school facilities on the basis of site location and size of a proposed facility. Construction regulations read in part:

> Approval by the division superintendent of schools and the superintendent of public instruction shall include the approval of the type of construction, the location of the site within the community, the desirability and need of the new building, the size of the building, the educational and functional planning, the strength of materials and construction, maintenance, cost of insurance, and such other pertinent factors that should be considered in cost of planning and erection of school buildings.

On March 3, 1950, Arthur E. Chapman, supervisor of school buildings for the State Board of Education, transmitted superintendent's memorandum No. 2434 to division superintendents, styled "Criteria for Selection of School Sites":

> 1. General location:
>
> *a.* Distribution of school population—number and location of pupils to be served.

b. Geographical location—distance pupils must walk or be transported.

c. Accessibility to public highway, transportation, or common carrier routes.

d. Probable future residential and commercial developments, including improvements or changes in highways and transportation routes—check with State Highway Department and public utility company.

e. Long-range educational and consolidation plans. Future trend in population and other developments should be studied and considered.

f. Use of the school for community purposes.

In the early 1950's, a special school construction fund was distributed through the State board of education to local school divisions. Chesterfield County received $305,723.01; Henrico received $368,222.46; the city of Richmond received $1,316,339.63. There was a further allocation of approximately half the size of the first distributed in the succeeding year.

The State board of education, immediately following the 1950 session of the general assembly, requested that each school division submit a program summarizing its school building needs for the next 4 years.

As long ago as 1936, the State Board of Education required that local school divisions submitting applications for State construction funds adopt a 10-year school construction program, "based upon a careful educational survey of the division."

Applicants for State construction funds were required to designate, until approximately 1965, the race of the students for whom the school was to be constructed.

Although in 1968 the State department of eductaion cautioned all division superintendents to consider the effect on desegregation of new school construction, this factor was not incorporated by the State department into its procedures for review of construction proposals submitted to it. In this respect, the State department confined its duties to "advice and help." The contribution that each new proposal would make to the elimination of the dual school system was not considered.

The State board's regulations on new school construction apply to the purchase and location of temporary units as well as permanent structures. On request, the State board of education will provide services to survey and project the construction needs and transportation needs of a school division. Also, on request, the State board will investigate the desirability of consolidation of schools within a division.

By memorandum of July 28, 1970, division superintendents were still further advised that approval by the State superintendent of public instruction was necessary for the relocation of mobile classroom units.

RACIALLY DESIGNATED SCHOOLS

In 1955, the board approved applications for State school construction moneys for the building of racially designated schools.

In 1956, the State board approved variations from school construction regulations for a projected Negro elementary school in Roanoke.

By superintendent's memorandum No. 3400, of May 21, 1957, the superintendent of public instruction requested a survey of school building needs by local school officials, covering the period July 1, 1957, through June 30, 1962:

> Three separate sheets for reporting survey of needs are being sent you as follows:
> White copy—for white schools (page 1).
> Pink copy—for Negro schools (page 2).
> Yellow copy—for summary (page 3).

In November 1959, the State department of education issued a bulletin canvassing State school construction needs. Enrollment figures, property values, and future needs were all determined on the basis of the assumption that segregation would continue. And 3-year need projections were made on that basis. Whites were anticipated to need $182,652,548 in new construction, and blacks $51,882,809, over that period.

Evidence of the competency of the State board of education to advise and criticize concerning site selections is a letter from John P. Hamill, assistant supervisor of school buildings, to Fred Thompson, the Chesterfield superintendent, in January of 1961. In response to a proposal to expand the Grange Hall High School, Hamill wrote that the existing facility was quite small, and the pupil population in the immediate area was not expanding at a great rate.

Given existing deficiencies in staff and library, the State official pointed out that it would be unreasonably expensive to provide a program of high school education at the Grange Hall site comparable to that in other Chesterfield schools. He pointed out that it was his assumption that most pupils going to Grange Hall lived within 15 miles of one of the other Chesterfield schools.

By superintendent's memorandum No. 4155, of August 21, 1962, division superintendents were advised that trailers and other portable school facilities could not be purchased or constructed without the approval of the State board of education.

On May 25, 1965, the literary fund had outstanding loans to school boards of $11,924,415.07. Cash on hand was $2,994,634.94. Loans approved by the State board and held in abeyance pending release of funds amounted to $10,586,650.

In February of 1967, the State board of education took a survey of division superintendents in order to determine school building needs throughout the State for school enrollment through June 30, 1970.

By memorandum of July 14, 1967, division superintendents were again reminded by the State board of education that Virginia law required the approval of the superintendent of public instruction for the acquisition of all types of school facilities, "including temporary and relocatable units; remodeling, alteration, and major renovation of school buildings; and the relocation of movable units at other schools." Again on July 28, 1970, division superintendents were still further advised that approval by the State superintendent of public instruction was necessary for each public school building project.

Pursuant to the request of the director of the Office of Civil Rights, Harry Elmore of the State board of education circulated to division superintendents on May 17, 1968, excerpts from a memorandum to chief State school officers concerning the "affirmative obligation upon local school officials to eliminate dual school systems through location and construction of schools." The excerpts from the memorandum do not employ the word "local." They do, however, state that formerly segregated school systems "have a positive obligation to see that school construction is deliberately used to eliminate the separate school system." A quotation from a judicial opinion is included, where in the Court states, "It is necessary to give consideration to the race of the students."

The Literary Loan Fund is a source of low-interest loans to localities for the construction of school buildings, administered by the State board of education. In some instances, loans from the Literary Loan Fund cover the entire cost of construction of school buildings.[19]

In August of 1971, there were $17,018,360 worth of loans to localities which had been approved by the State board of education, the funds for which were held in abeyance pending availability.

Unless a proposed item of new school construtcion meets standards established by the State board, the submitting locality is denied State funds for the purpose.

In the curernt State board regulations concerning school facility site selection, desegreagtion is not referred to either in recomemndations or binding regulations. Much is said, however, about anticipating the growth of areas of new settlement and cooperating with public and private agencies to coordinate school plant construction and expansion.

Henrico School Construction:

In 1949 a committee was appointed to seek a location for a consolidated Negro school in the Tuckahoe district of Henrico County.

In November 1951, the board contracted to construct the Varina white elementary school and reviewed the white housing patterns with an eye to future school needs. They also talked of Negro school construction, without arriving at any decision, save to consider, on a request from black PTA members, the installation of indoor plumbing in the Union Negro School. At a subsequent meeting white and black building needs were determined by specific resolution.

In July 1952, a white census was authorized by the school board.

The PTA of the Gravel Hill School, a black school, petitioned the Henrico School Board in March of 1953 to replace the outdoor toilets and other defects.

In 1953, the Henrico School Board requested the State board of education to rule that certain thickly populated areas be ruled a "metropolitan district equivalent to a city," and therefore exempt from site area requirements imposed on counties. School plans were submitted to the State board before final architectural drawings were made.

The Henrico School Board passed a resolution in favor of a subdivision ordinance requiring the dedication of a school site by developers, the location to be chosen by the developers and the capacity to be over 275 and preferably over 500.

Revised State construction regulations were issued, effective April 1, 1955. State regulations required the school board to enlarge the Sandston Elementary School site by 5 acres in 1955.

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[19] In May of 1957, the attorney general of Virginia, in the face of the *Brown* decision, ruled in an official opinion that Richmond County officials might use literary loan fund and battle construction fund moneys to construct a consolidated elementary school designated for Negroes. Rep. Atty. Gen. 229 (1957).

In 1955 the school board selected names for the two "Negro schools under construction," the Vandervall School in Tuckahoe District, and Henrico Central in Varina District.

In July of 1955 the school board appointed a committee to formulate school zones within the district.

In August, 1955, the school board requested the superintendent to prepare a spot map showing the home of each Henrico pupil, the school which he attended, and his race.

In February of 1956 the school board invited the planning commission to cooperate with it in choosing sites for new schools.

In February, 1956, the school board instructed its superintendent to discuss with the State superintendent the matter of constructing temporary classroom buildings to alleviate overcrowding at five existing schools. The approval of the State board was solicited. On the same day the Henrico supervisor of transportation was requested to make a detailed study of the entire transportation system; to this end, he was authorized to confer with the division of transportation in the State department of education.

In February, 1956, the Henrico board appointed a committee to confer with the State department of education in an effort to get speedy approval of plans for emergency classroom buildings. The same day, five contracts were awarded for the construction of annexes to existing schools.

In March of 1957 the board directed the superintendent and other officials to request that the State board of education approve the construction of emergency units at Highland Springs and Hermitage high schools in order to relieve overcrowding.

On June 10, 1957, Superintendent Moody of the Henrico school division made application to the supervisor of school buildings in the State department of education for permission to add four classrooms to Henrico Central Elementary School. Moody projected an enrollment of 290 for the building in the school year 1957–58. He remarked that, "When constructed, the Henrico central facility had been designed to be easily expanded." He requested a waiver from space requirements for the library. A hand-written notation on the letter to the State Department identifies Henrico central as the "Varina Negro School." Moody attached to his letter a "statement of need." He told the State board that "the Negro school population increase has been definite and steady, although not so pronounced as the white.

"The Henrico Central Elementary School has eight classrooms and is now using the library as a classroom. The preschool survey indicates some increase in the first grade for next session. To reduce combination grade arrangements and free the library from classroom use will require two classrooms for the session 1957–58. To further prepare for expected enrollment increase over the next few years, another two classrooms will be required.

"It is therefore proposed that four classrooms be added to the Henrico Central Negro Elementary School as soon as possible. We believe such addition will satisfy the needs for classroom space in this school for the foreseeable future."

The four-room addition to Henrico Central School was built in 1958. Henrico Central is the current Varina Annex and is located about 1.2 miles from the Varina school.

On May 8, 1957, Moody applied to the supervisor of school buildings for leave to expand the Vandervall School in Henrico County, a black elementary school, by adding six classrooms. He foresaw an enrollment of 336 for the school in 1957–58. The Vandervall School had then only recently been built with eight rooms, and had been designed for easy expansion.

Moody wrote to the school building service of the State board of education on March 4, 1958, to request leave to make additions and alterations to the Virginia-Randolph Combined Elementary High School. The purpose of these renovations was to "furnish adequate facilities" for all Negro high school students in the county, and the elementary students now living in the Glen Allen area." An entirely new elementary school plan was proposed. This would contain 14 classrooms and another 20 classrooms would be added to the existing buildings for the use of high school students.

Moody's statement of needs related to the Virginia Randolph project reads as follows:

> The population increase among the Negroes of Henrico County has been less spectacular than has that of white residents. However, the Negro school population has increased and recent trends indicate this increase would continue. It is, therefore, thought advisable and necessary to provide for expanding the present facilities for Negro school pupils in Henrico County.
>
> At the present time classrooms are being added to the Henrico Central and Vandervall Elementary Schools which will help solve some of the problems of increased enrollments in those areas. It is believed that a need for more adequate facilities exists at Virginia-Randolph High and Elementary Schools.
>
> Present trends point to an estimated elementary enrollment at Virginia-Randolph Elementary of 340 by 1963 and a high school enrollment of approximately 665 by the same time. If the above estimates are borne out the addition of 12 to 14 new elementary classrooms and a rather extensive renovation of existing high school facilities, plus some added classrooms, will be required to meet this growth and provide for improvements in the curriculum offering.

On November 19, 1959, Superintendent Moody submitted to the supervisor of school buildings a plan for a 900-pupil elementary school in the Central Gardens subdivision of Henrico County. His statement of need cited overcrowding in the one existing school in the Central Garden area and the two outside the zone, to which pupils were being transported. Moody reported that the Central Gardens area was being developed rapidly. "The majority of homes constructed are in the low-price field and are being sold as rapidly as completed." He noted further: "Since 1955, when Ratcliffe Elementary School was constructed, 350 homes have been constructed in the Central Gardens subdivision, of which 300 homes are completed. In Glenwood Farms, which is adjacent to Central Gardens, 56 homes are being built. This does not include individual homes which have been built in this area. Ratcliffe School is operating at full capacity, and children which would normally go to this school are being diverted to Glen Echo and Glen Lea Elementary Schools. In Hechler Village, near Glen Echo School, 197 homes are under construction, which will shortly saturate the school, unless relief is provided by construction of the Central Gardens Elementary School."

On June 3, 1960, Moody stated to the school building service of the State department of education that although Virginia Randolph School had been completely renovated in 1958 by the addition of a 14-classroom elementary unit, still the school board was of the opinion that the high school facilities there "must be modernized and made equal to other secondary school facilities recently constructed in the county." At this all-black high school, he noted, enrollment currently stood at 470. He expected this figure to rise to 566 in the next 5 years. Moody hoped to complete the task of renovation with funds from a pending bond issue.

An exhibit in the 1962 annexation proceedings between the city of Richmond and Henrico County shows then existing schools in the city and Henrico. The legend distinguishes between white and Negro facilities. Fairfield Court School in 1962 was classified as a Negro elementary facility. Other exhibits from those proceedings designate city and county schools by race.

A proposed four-classroom addition to the Fair Oaks Elementary School was submitted for approval by the State board of education by Moody, superintendent of Henrico, on March 28, 1963. The cover letter bears the handwritten notation "negro." The Fair Oaks School, in the eastern end of Henrico County, was built in 1951 with an intended capacity of 210 pupils.

The statement of need contains the following summary of a survey conducted by Henrico school authorities:

> Negro housing starts: a subdivision between Cool Lane and the Central Gardens area is under construction, consisting of 33 units, which would add approximately 40 pupils of the elementary school level to the Fairfield district. In addition, Negro residents have moved into the Glenwood Gardens area which is near this new subdivision and have added 12 elementary school pupils to the county. At the present time these pupils are being transported to the Virginia Randolph Elementary School in the Brookland district.
>
> It is contemplated assigning the elemenetary pupils from the Glenwood Gardens and Cool Lane areas to the Fair Oaks Elementary School. This, together with the present overcrowding, will require a total of four additional classrooms to the seven existing classrooms, which will adequately house a maximum of 330 pupils for the next 5 years.

The State board of education, on the basis of this submission, approved the proposal. The additions would enable the school board to cease transporting new black residents in the area to the Virginia Randolph Elementary School in the far north of Henrico.

The State board of education, however, cautioned the Henrico school board to look beyond its immediate future needs. Rather than constructing an addition to accommodate Negro residents, the State official raised the possibility of an entire new school. Moody responded, "With the 330 pupil enrollment possible in the expanded Fair Oaks School, it is felt that there will be little additional growth of the Negro population in this community of the Fairfield district within the conceivable future, and from this projection no planning for a new elementary school to house Negro pupils would be necessary."

The approval by the State superintendent of public instruction for new construction was never automatic.

In February of 1965 the Henrico School Board received a revised population study and predictions, including rezoning proposals for the school year 1965–66. The study included separate projections for Negro and white population and under the rubric "Negro population," projected occupancy for the Fair Oaks, Henrico Central, Virginia Randolph Elementary, Vandervall, and Virginia Randolph High Schools.

Prior to the 1966–67 school year the school board considered a pupil population study presented by the director of research and, on the basis thereof, directed some double shifting of grades 1 and 2 and modifications of zone lines.

For 1966–67 the school board altered zones for Highland Springs Elementary School, Fairfield Junior High School, Glen Allen Elementary School, Maude Trevvett Elementary School, Pinchbeck Elementary School, and Ridge Elementary School.

In February of 1967 new school zone lines were drawn for Tuckahoe Elementary School, Ridge, Pinchbeck, Maybeury, Carver, Short Pump, Highland Springs, Adams, Montrose, Sandston, and Seven Pines Elementary Schools.

On March 20, 1968, the Henrico Board of Supervisors met with the school board to discuss construction plans for the Harry Flood Byrd High School and the annual financial plan for school operation for 1968–69.

In March of 1968 school zone lines were redrawn for Holladay, Chamberlayne, Lakeside, Dumbarton, Trevvett, Glen Allen, Adams, and Seven Pines Elementary Schools.

For 1969–70 the Henrico School Board modified zone lines for Davis, Longan, Longdale, Glen Allen, Laburnum, Chamberlayne, Maude Trevvett, Dumbarton, Adams, Highland Springs, Sandston, and Seven Pines Elementary Schools.

Per the request of the director of recreation for the county of Henrico, the school board transferred the Coal Pit Elementary School site to the county of Henrico for recreational purposes. Consideration was in the amount of $1.

For the 1970–71 session, new school zones were established for Fair Oaks School, Varina Elementary School, Fairfield Junior High School, Laburnum Elementary School, Seven Pines, and Chamberlayne Elementary Schools. The former Henrico Central Elementary School was reopened as the Varina Elementary School Annex.

On February 25, 1971, the director of construction reported on progress of the school building program.

In March of 1971, zone changes were made for the following Henrico secondary schools: Douglas Freeman, John Randolph Tucker, Hermitage, Henrico, Highland Springs, and Varina High Schools; Byrd, Tuckahoe, Hermitage, Fairfield, and Brookland middle schools.

Currently, Henrico County does not have any applications pending for literary loan fund moneys.

From the year 1954 to date, Henrico County School Board bond issues total $49,530,000. There have been 11 issued. Fifty-two percent of these funds have been acquired in three issues made in 1967 through 1970. No construction has been done in the county of new schools since 1959, without bond financing.

From 1954 through 1971, 31 new schools were built in Henrico County and 36 additions were made to existing schools. Fifteen schools were built in the years 1954 through 1960; 10 of these were overcrowded when they opened. In these years, 15 additions were made; 12 of the schools involved exceeded their capacity when they were opened. To meet rapid school population growth, Henrico County used temporary facilities and a double-shift system in the primary years. The county kept track of the predicted movements of population, foresaw the completion of new subdivisions, predicted overcrowding, and located new school sites accordingly, attempting to build the facilities as near as possible to the centers of population. New classrooms were built at the rate of about one for every 3.1 working days.

Racial considerations have definitely played a part in the school construction program of Henrico County.

A comparison of construction data and racial enrollment information shows that over the years, by a combination of site selection, decisions on capacity, and choice of attendance methods, the Henrico school division has achieved segregation in most of its new facilities. In 1966, Tuckahoe Elementary School opened with a new addition; its racial composition was then 3.3 percent black. That year an addition was made to J. R. Tucker High School, and it opened that fall with a student body of more than 1,900, of whom 20 were black.

In 1967, the Adams Elementary School was newly opened; it served 21 blacks and 774 whites. Carver Elementary School was new that year as well; it housed seven blacks and 589 whites. Highland Springs was a third new elementary school in 1967; its student body was 0.4 percent black, composed of three blacks and 706 whites.

Elizabeth Holladay Elementary School opened in 1968. Two blacks and 649 whites were in attendance. That same year an addition to Glen Lea Elementary was put into use. Glen Lea was 1.9 percent black, with eight black students among 411 whites. Douglas Freeman High School opened a substantial addition in 1968; the school was attended by 1,654 whites and six blacks. Laburnum Elementary School, with a 20.4 percent black student body in 1970, is the only school with a noteworthy black enrollment, the year new construction was completed, to the extent the data discloses.

Although school-by-school racial composition figures are not available prior to the 1966–67 school year, it is possible to determine on the basis of available data that many of the schools built, since 1954, did not contribute to the desegregation of the system. Douglas Freeman High School, built in 1954, and with additions in 1961, and subsequent thereto, was in 1966, 0.7 percent black. Lakeside Elementary School, which had a substantial addition completed in 1954, was all white and under capacity in 1966–67. Crestview Elementary built in 1955, and with an addition in 1956, by 1966, had no black students and was likewise under capacity. Glen Lea Elementary opened with a substantial addition in 1955. By 1966, it had an all-white enrollment. Henrico Central Elementary opened in 1955, and was added to in 1958. In 1966, it was 100 percent black. Laburnum Elementary School built in 1955, and expanded in 1960, housed a 4.7 percent black student body in 1966. Montross Elementary expanded in 1955, was all white in 1966. Ratcliffe Elementary, dating from 1955, housed only white students in 1966. Sandston Elementary School enlarged in 1955, was all white still in 1966. Short Pump Elementary School enlarged in 1955, taught eight blacks and 270 whites in 1966. Vandervall Elementary was opened in 1955; in 1966, it was 100 percent black. Tuckahoe Elementary School built in 1956, 10 years later had a 3.3-percent black enrollment. Baker Elementary School, built in 1957, was 3.1 percent black in 1966. Hermitage High School and Highland Springs High School were each expanded in 1956 and 1957; in 1966 Hermitage was 0.7 percent black and Highland Spring 1.6 percent black. Skipwith Elementary School, built in 1957 was 0.7 percent black in 1967.

The opening of Trevvett Elementary School in 1958 saw Bethlehem Elementary School, Fairfield Junior High School, Maybeury Elementary School, and Tuckahoe Junior High School. In 1967, Trevvett was all white Bethlehem had one black and 735 whites, Fairfield Junior High was 4.6 percent black Maybeury was 0.6 percent black, and Tuckahoe Junior High 0.7 percent black. 1958 also saw additions to Henrico Central and Vandervall Elementary Schools; these facilities were all black throughout their existence.

In 1959, Seven Pines Elementary School opened and was enlarged in 1965; no blacks attended it in 1966. In 1959, Virginia-Randolph Elementary School was opened; this was all black in 1966–67. Brookland Junior High was built in 1959, expanded later, and by 1966, it housed 10 blacks and 1,586 whites. Central Gardens Elementary School opened in 1961, with a capacity of 810 students; in 1966, it was 62.6 percent black and only 522 students were in attendance. Chamberlayne Elementary School opened in 1961, and in 1966, was 0.7 percent black. Pinchbeck Elementary School also opened in 1961; it was all white in 1966. An addition was made to the Ridge Elementary School in 1961; and in 1966, it was 2.2 percent black. Virginia-Randolph High School, all black throughout its period of operation, was expanded in 1961.

In 1962, Jackson-Davis Elementary School was opened; 4 years later its enrollment was 703 whites and one black. Varina High School, opened in 1962, was 11.1 percent black, substantially desegregated in terms of the countywide ratio in 1966, but it was operating over 150 pupils under capacity. Henrico High School also opened that year had 0.8 percent black enrollment in 1966. J. R. Tucker High School opened that year as well and had less than 1 percent blacks in its student body 4 years later.

In 1965, R. C. Longden Elementary School opened; the next year it had two blacks and 691 whites in a building with a capacity of 810.

Chesterfield School Construction:

In 1940, the Chesterfield superintendent recommended to the board that Centralia and Kingsland Negro schools be consolidated.

At the August 1940, meeting of the Chesterfield school board the superintendent reported that the State board of education had approved Chesterfield's applications for literary fund loans totaling $200,000 for construction at two white high school sites. The State department conditioned its approval as to the Manchester project on a change in site.

At the board meeting of October 28, 1942, black residents of the Kingsland area requested the board to replace the Kingsland School with a modern brick building. At a subsequent meeting a committee reported that no real fire hazard existed at the present Kingsland School.

In 1945, the board directed its superintendent to secure the approval of the State board of education of plans for a black high school for all blacks in Chesterfield County, "including those now attending D. Webster Davis High School."

In March 1945, a delegation of black citizens called the board's attention to alleged inadequate facilities at the Kingsland colored school. The board accepted the petition and assured the group that plans for improved facilities were in progress.

In 1945 or 1946, the superintendent recommended and the board approved a county school building program, including a Negro high school for 300 students, three Negro elementary schools, and additions to two white elementary and two white high schools.

In 1946, the board decided upon a site for the black high school and authorized the superintendent to purchase it at a price of $100 per acre or less. At a later meeting, upon learning that the owner would accept only $150 per acre, the board deferred the construction plans.

In September 1946, a delegation of the Kingsland PTA requested that the board relieve overcrowding in that school. The board directed that their petition be received and filed and stated that steps would be taken to relieve the situation.

In March of 1947, a delegation of blacks from throughout the county requested the board not to build the proposed black elementary schools before the high school. The board resolved to begin construction on the new elementary schools and the high school immediately and concurrently. Subsequently, application for literary loan funds were made for the four black schools.

The board of supervisors, on July 8, 1947, approved a building program for county schools presented to it, which included additions to the Manchester, Midlothian, and Thomas Dale High Schools, the Beulah Elementary School, and the Broadrock School; and the construction of a new Negro elementary school to replace Union Grove and Union Branch Schools.

In 1948, the board of supervisors authorized application for additional loans for school construction, the funds received from the Literary Loan Fund having proved insufficient to meet the lowest construction bids.

In 1948, construction of the Negro high school was underway.

On April 8, 1949, the board of supervisors approved the school board's application for loans to construct four Negro schools: consolidated elementary schools at Midlothian, Winterpock, and Kingsland: and a consolidated high school.

In 1950, on recommendation of the superintendent, the board resolved to close the Gravel Hill School at the end of the then current session and transport its pupils to the Hickory Hill School. They also directed the superintendent to complete repairs at Hickory Hill before the beginning of the 1950–51 session.

In March 1950, the State superintendent requested the Chesterfield School Board to adopt a plan of construction through the year 1954. The board, in response, adopted a program of additions and new construction. The only new construction for Negro pupils was to be in the Union Branch Elementary School, capacity 150. The board planned to build three new white elementary schools and to make additions to four white elementary and secondary schools.

On the superintendent's recommendation, the school board, because the Hickory Hill frame building was not in good enough condition to warrant extensive renovation, decided to make only minor repairs to that facility.

In 1950, the board directed that arrangements be made as soon as possible to relieve overcrowding at the Kingsland School.

In 1950, the board purchased additional land for the site of the new Union Branch School, to conform with minimum acreage requirements of the State Board of Education.

In January 1951, Hickory Hill citizens requested that the school board commence construction of a planned addition to the brick building at the Hickory Hill School. The board stated that other construction jobs had to be taken care of first.

In early 1951, the superintendent advised the board that the Matoaca PTA "desired to know definitely whether or not toilets would be installed in the first-grade classroom." The board declined to act.

On May 3, 1951, the board of supervisors approved the school board's application for Literary Fund loans for construction of a Jonestown School, a Bensley Village School, and an addition to Hickory Hill School.

In November 1951, the Hickory Hill PTA again requested relief from overcrowding on the bus and in the school facilities. The board stated that another bus would be assigned and that construction would begin as soon as the State provided the money.

In January 1952, black patrons of the Midlothian School requested permission to use a room in the building for a kindergarten class. They stated that all expenses would be paid by the community. The board denied this request.

In 1952, a telephone was installed in the "Midlothian colored school."

The State Board of Education allocated $172,415.56 as Chesterfield's final portion of the Battle Construction Fund due July 1, 1953.

The Chesterfield Board of Supervisors on January 28, 1953, ratified the county school board's resolution determining that certain school construction programs were immediately necessary. The facilities listed were as follows: Jonestown, $95,000; Kingsland and Carver, $100,000; Bensley, $350,000; Broad Rock, $45,000; Hickory Hill, $100,000; Enon, $225,000; Grange Hall, $225,000; additional schools in Manchester district, $700,000; Forest View, $175,000; Midlothian, $250,000; Bon Air, $125,000; Union Grove, $40,000; Beulah, $100,000; Ettrick, $20,000; Matoaca, $25,000; purchase of land, $75,000; equipment, $190,000; sewage disposal, playgrounds, athletic fields, et cetera, $160,000.

At the same meeting, the board of supervisors adopted a resolution previously adopted by the county school board to issue $3 million in county bonds to finance new school construction. This was a necessary preliminary to a bond referendum.

In late 1953, Hickory Hill patrons requested further repairs to that building and a higher priority for new construction on the site. The superintendent advised them that minor repairs had been made, electrical problems would be investigated, and that "it shouldn't be very long" before the construction was commenced.

In 1954, the Hickory Hill PTA again called to the board's attention alleged unsafe conditions at the school and on the buses. The school board promised to study and correct the conditions.

Under a decision of a Virginia State circuit court, it was impossible for Chesterfield County to validate unsold school construction bonds in the amount of $1,500,000 for the reason that the referendum authorizing such bonds was conducted prior to the ruling in *Brown.* That decision "brought school construction in Chesterfield County to an abrupt end."

On March 22, 1956, the board of supervisors adopted a resolution determining the necessity for $3,500,000 in new school construction, preparatory to the holding of a bond referendum.

In early 1956, the school board requested its Commonwealth's attorney to solicit an opinion by the attorney general of Virginia as to whether school bonds, for which a $3,500,000 referendum was impending, would be used for integrated or segregated schools. The school board desired to know whether it would be legal to spend the money for integrated construction without the consent of State authority.

The Matoaca PTA pledged support of the bond issue.

At the board of supervisors' meeting of April 3, 1956, R. J. Britton, a supervisor, stated that in his belief the bond referendum would achieve citizens' support if "safeguards were effected to prevent the integration of races in the county schools."

The bond issue failed at the referendum of May 29, 1956.

On September 6, 1957, the board of supervisors passed a resolution confirming the necessity of $4,500,000 in new school construction and of the issuance of bonds in the amount.

On October 15, 1957, the voters of Chesterfield County ratified the $4,500,000 bond issue presented to them.

The Chesterfield School Board has consistently received the approval of the State board of education for construction projects designated for the white or the black race. By letter of March 20, 1958, Superintendent Fred D. Thompson of the Chesterfield County school division notified Arthur E. Chapman, supervisor of school buildings of the State Board of Education, of the school board's having contracted with four architectural firms for school construction. Four elementary school projects and one high school project listed, as well as additions and alterations to another elementary school, were not designated by race. However, Thompson further noted that architects were to perform work on alterations to the Carver High School, the Kingsland Elementary School, and plans for a new elementary school in the Ettrick area. Each of these projects was designated "N."

On January 7, 1959, Thompson sent to Chapman further information for a proposed four-room Negro elementary school to be placed in the Ettrick area. He noted that for years, many Chesterfield County residents attended the Matoaca Laboratory School, operated by Virginia State College. That school could accommodate no more than 100; additional facilities for blacks in the area, therefore, were required.

Further information concerning this Ettrick area school was transmitted to the State board on December 18, 1959. Thompson noted that the site previously selected "is unacceptable to many of the Negro citizens," and therefore the project was held up. The proposed school, said Thompson, would absorb enrollments from the area for the next 5 years. Thompson added, "It is conceivable that the enrollment in 10 years would reach 360, but with the problems of the day, I find it entirely foolish to try to project my thinking for so long a period as 10 years."

On October 28, 1959, there was a fire in the frame building on the Hickory Hill School premises, causing damage in the amount of $2,713.50.

In 1958, a school board member offered a resolution that the county refrain from awarding contracts for new construction until State funds for those purposes could be guaranteed. He feared the termination of State funds in the event the schools were integrated. The school board carried the matter over for discussion.

In early 1959, a delegation from the Ettrick area requested that a more suitable site be acquired for the Negro school planned for the district.

In October 1959, a delegation of the Matoaca Laboratory PTA presented a petition to the board expressing its concern about the future outlook for elementary children in the Ettrick area. They restated their objections to the board's construction plans and "urged the board to select another site and to erect thereon a school large enough to provide adequate facilities."

In early 1960, the county school board requested the State superintendent of public instruction to waive site acreage requirements for the proposed Union Grove Elementary School addition. The State superintendent granted a waiver until the necessary additional land became available.

On December 7, 1960, the superintendent reported to the Chesterfield board on a recent study made by his staff on space requirements for September 1961, in the white elementary schools where overcrowding was anticipated. To cure this, the superintendent proposed transferring sections of grades between buildings, renting additional teaching spaces, and using temporary housing.

It was the superintendent's intention in 1961, to open the Ettrick area school to all area residents, with the Matoaca Laboratory School's admissions covered by Virginia State College.

In late 1961, the superintendent announced to the board plans to open the school on Dupuy Road and advised them that children now attending Matoaca Laboratory School and Union Grove School would be transferred to the new school.

The school board was advised that upon the opening of the Ettrick area elementary school, the laboratory school's enrollment would be reduced to 100 pupils, the enrollment of Union Grove would be cut to 150 pupils, and the Ettrick school would accommodate 120 pupils.

In May of 1962, the Chesterfield school board transmitted to the State board of education its projections as to county school enrollment over the succeeding years. Over the previous 7 years, it was indicated, white elementary enrollment rose 601 per year; white high school enrollment rose 415 per year; Negro elementary enrollment rose 32 per year; and Negro high school enrollment rose 11 per year.

The 1962 data evidences an anticipation that white high schools would continue to be operated separately, at least through 1966, from the county's Carver Negro High School. The report also gave September 1961 enrollment figures for all grades in the county's elementary schools, listing white and Negro schools separately. High school figures were also listed.

Based on the trends documented, the Chesterfield County school board stated that two additional classrooms at Midlothian and Hickory Hill Negro facilities would be required in the then immediate future. At each, furthermore, a room each year for the succeeding 5 years would be necessary. The Negro high school, the board stated, needed an auditorium and would require two new classrooms within 5 years. Under separate headings Chesterfield listed the necessary additions and new construction for its inventory of white high schools. Projected new classrooms needed at the elementary level were given through the year 1966–67.

Attached to the figures on new construction needs was a status report on the current Chesterfield $6 million school construction program. Each facility listed, 26, either for renovation or as new construction, was designated by race.

In early 1964, the Chesterfield school superintendent presented each board member with a copy of a recent population study of the Richmond, Chesterfield, and Henrico area.

On June 1, 1964, Fred Thompson of Chesterfield wrote to Arthur E. Chapman in the State department of education, concerning expansion of the Carver black high school. Thompson proposed to add two classrooms and an auditorium. Need for the new facility was predicated upon enrollment projection through the year 1974. Carver was, at that time, and for several years thereafter, an all-black school.

On March 25, 1965, the board of supervisors passed a resolution determining the need for $10 million for capital school improvement purposes, preparatory to a bond referendum.

On May 31, 1965, Thompson again wrote Chapman concerning an elementary school proposal for the village of Ettrick. He suggested placing a new 15-room elementary school on the site then occupied by an elementary school building dating from the early 1920's. The old Ettrick Elementary School had historically been an all-white facility. Thompson sought a waiver of site area requirements by the State board. By a later letter Thompson advised Chapman that he thought the new school should be placed on this marginal site partly because the community had developed a strong attachment to the school as a social as well as a cultural center. "Although they are finally resigned to the fact that the building must go, we feel that there would be strong resentment to our relocating the school."

On September 8, 1965, Roy A. Alcorn, Chesterfield school division superintendent, transmitted to the State board a revised request concerning additions to the Carver High School. He asked for waivers of

State requirements on a few minor points. Concerning enrollment projections at this all-black high school, he made the following statement:

> I feel that although not substantiated by past data, as a result of relatively recently enacted Federal legislation, a leveling off, if not decline, in enrollment at this all Negro high school will be experienced. A new library and conversion of the existing facility into two classrooms would be in order if the next 2 years proves our judgment incorrect. Present library space and acreage would not be a serious detriment in the meantime. (PX–93.)

On September 26, 1967, the voters of Chesterfield County passed a $14,600,000 bond issue for school purposes which had been supported by the school board and board of supervisors.

Each year between 1958 and 1968, Chesterfield County built a considerable number of school classrooms.

In 1967, the Chesterfield school board requested that the State department waive minimum acreage requirements for the J. B. Fisher School and the Matoaca Elementary School for the construction of kindergarten units.

As of August 20, 1971, it was the policy of the Chesterfield County school board to receive and transmit State funds, computed on the basis of average daily membership, to Virginia State College for the support of the Matoaca Laboratory School. In addition, Chesterfield provides bus transportation for Matoaca Laboratory pupils.

None of the construction projects currently underway in Chesterfield County was planned with a view to assisting the desegregation of various county schools by a strategic location of the site.

The current Chesterfield superintendent was unaware of a memorandum distributed by Harry Elmore, of the State department of education, to division superintendents on May 17, 1968, which advises division superintendents of HEW's requirement that they make site selection decisions with an eye to the effect of the location of new facilities on desegregation.

In September of 1971, two new schools were opened in Chesterfield County. The Salem Junior High School has a zone comprising the Meadowdale section, the Beulah section, and the Bensley section. The Robious Junior High School accepts students from the Bon Air and the Crestwood sections of Chesterfield County. These schools have been in planning for at least 2 years, and were financed by a recent Chesterfield County bond issue.

In November of 1970, a $17.7 million bond issue passed in Chesterfield County. Funds from such bonds will be used to construct three elementary schools and a new middle school. Major renovations to about a dozen other schools are also planned. The three elementary schools will serve the Chester area, Beulah-Bensley, and the Green Hill areas. The middle school will be in the Ettrick-Matoaca area, in the southern portion of the county.

In the past 20 years, 33 new school facilities have been constructed in Chesterfield, and since 1953, each building constructed has been within 5 percent of capacity on its opening.

Racial considerations have definitely played a part in the school construction program of Chesterfield County.

PERIOD OF MASSIVE RESISTANCE

As of December 29, 1956, the power of enrollment of pupils in public schools in the State became vested by State law in the pupil placement board, which continued as an official body until 1968.

One of the more striking examples, by way of illustrating that the central State officials have for many years past maintained degrees of statewide jurisdiction of the local school authorities, is illustrated by an exhibit in the form of a letter written in 1958 by the then attorney general of Virginia to Hon. Robert F. Baldwin, Jr., a Norfolk resident. The attorney general's letter referred to matters of then current concern to the Norfolk City Council, as well as to the school board. The pertinent parts are herein quoted:

> We are doing everything we can to take the pressure off the city council and the school board and trying to resolve as quickly as possible the problems that they present to this office.
>
> You will recall that the State pupil placement board was designed to remove the assigning powers from local boards and because we knew the confusion and pressure that would be on these boards when integration was attempted in any area. I am still hopeful that maybe we can channel this phase of the school problem—the assignment powers—back to the State board and away from the localities. As long as possible it is important that we maintain a statewide policy, and this can certainly be best accomplished through a central assigning agency.
>
> The next time you are in Richmond, please call by the office.

The period of resistance to the law of the land as enunciated by the Supreme Court of the United States in 1954, had begun to achieve effective momentum.

On May 28, 1954, the State superintendent issued memorandum No. 3025 to division superintendents and chairman of local school boards. This related that the State board of education had sought an opinion of the attorney general of Virginia concerning the effect of the U.S. Supreme Court's recent ruling declaring segregated educational facilities to be unconstitutional. A copy of the opinion was enclosed. In addition, the State superintendent advised his subordinates, the State board issued the following policy statement:

> The local boards of education are hereby advised to proceed as at present and for the school session 1954–55 to operate the public schools of this State on the same basis as they are now being operated and as heretofore obtained.

At the time, State law required segregation.

In the summer of 1954, the then superintendent of public instruction publicly stated his concern over the *Brown* decision. Some of his statements were transmitted by memorandum to local school division superintendents. On July 6, 1954, memorandum No. 3038 was issued. He quoted some recent remarks of his:

> I have previously stated my awareness of the grave concern of many prompted by the decision of the Supreme Court . . .
>
> The responsibility of my office is to administer our program of public education in keeping with the policies of the State board of education and in compliance with Virginia's constitutional and statutory provisions. In doing so I shall keep in close touch with our local division superintendents of schools who have a grave responsibility on the local level. Their advice and counsel is of inestimable value and will be sought continuously. Their concern must continually be my concern.
>
> It is my conviction, however, that it is not appropriate for me, at this time, to make public statements regarding specific procedures to be followed.

On June 23, 1955, the State board discussed procedures to be followed in the light of the decree issued in *Brown* v. *Board of Education.*

Unanimously, and with the concurrence of the Governor, the board resolved that steps to desegregate the schools could not be taken until the general assembly enacted appropriate legislation. Consequently it was adopted as "the policy of this Commonwealth that the State board of education will continue to administer its functions, in cooperation with the local school authorities, to the end that the public schools of Virginia open and operate through the coming session as heretofore."

The June 1955 resolution of the State board calls for a deferral of effort to desegregate the State's schools until the general assembly were able to enact legislation to facilitate the move. No such legislation was ever passed. Therefore, the State board of education, according to witness Blount, did not initiate procedures to require integration. The board operated pursuant to the laws of the State of Virginia, according to him, until 1965. Since that time, it has been under a compliance agreement with the Department of Health, Education, and Welfare.

In December of 1955, the State board, in explicit response to the *Brown* decision, endorsed proposals by the Commission of Public Education, providing for "a high degree of local autonomy in the operation of their schools." The board declared at the same time its opposition to "enforced integration of either white or Negro pupils in mixed schools against the will of their parents," and noted that a tuition grant system might be "of great value."

On October 7, 1957, the then attorney general of Virginia transmitted to the Governor a memorandum concerning the operation of certain acts of the extra session of 1956. "This memorandum will, I believe, serve as a basis for laying plans for a course of action in the event any school becomes integrated," he wrote. The memorandum, set out in full in a footnote, provided a brief résumé of the early massive resistance laws. He gave his opinion as to the wisest manner in which to apply this legislation.[20]

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[20] Copy of memorandum referred to is attached as app. B and marked as portion of PX-144-I.

On August 5, 1958, the attorney general of Virginia responded to a request for an official opinion by the Governor of Virginia. The Governor had asked for an opinion as to the time at which the Commonwealth of Virginia assumes control over any public school in the State if white and Negro children are enrolled in such school. The attorney general reviewed the 1956 enactments of the general assembly providing for such assumption of control and construed section 22–188.5 of the Code of Virginia:

> The making of such an assignment and the enrollment of such child or children shall automatically divest the school authorities making the assignment of all further authority, power and control over such public school . . .: and such school is closed and is removed from the public school system, and such authority . . . shall be, and is hereby vested in the Commonwealth of Virginia, to be exercised by the Governor of Virginia, in whom reposes the chief executive of the State.

The attorney general construed the term "enrollment." This occurred, in his opinion, as soon as a pupil's assignment becomes final.

> If thereby the school becomes an integrated school it is automatically closed by operation of law and is removed from the public school system. It then becomes the duty of the Governor to assume control over the school, make every reasonable effort to reopen or reorganize the school, and return it to the public school system as soon as possible, provided its return can be accomplished without disturbing the peace and tranquility of the community and without enforced integration of the races therein.

In September of 1958, 17 black students were assigned by the Norfolk School Board to six formerly all-white schools. The division board ordered those schools to open. On September 28, 1958, the Governor of Virginia transmitted a letter directing that those six schools were closed and removed from the public school system. State police converged on the facilities and ordered everyone to leave.

Two days after the effective date of the act which vested in the pupil placement board the power to enroll pupils in Virginia public schools, the superintendent of public instruction sent to division superintendents a memorandum which quoted and interpreted a directive by the pupil placement board, which gave, as the superintendent read it, to each school board the discretionary power to permit a child to attend school pending final action by the pupil placement board.

A further memorandum went out shortly thereafter, styled superintendent's memorandum No. 3360, from the superintendent of public instruction, and transmitted at the request of the pupil placement board, setting forth the procedures which the board would follow.

A then special assistant in the State department of education in charge of Federal programs, while so employed served on the placement board.

On May 24, 1965, the executive secretary of the pupil placement board wrote to the superintendent of Henrico County schools to certify that the pupil placement board had the policy of cooperating with local school boards presenting desegregation plans to HEW by placing pupils in accordance with the proposals and recommendations of the school board.

By memorandum of February 14, 1961, the then assistant superintendent of public instruction notified division superintendents that the State board of education, at its meeting of February 3, 1961, had promulgated rules and regulations to be employed by local school boards in making placements of pupils under sections 22–232.18 through 22–232.31 of the Virginia Code, enacted in 1960, which enabled local school boards to resume the authority theretofore exercised by the pupil placement board upon the condition that they comply with regulations of the State board of education. Criteria, which the State board was required by statute to promulgate, governing the assignment of pupils were as follows:

> "1. The following criteria shall be used in the placement of pupils:
>
> a. The scholastic aptitude, academic achievement, and mental ability of the pupil;
>
> b. Availability of facilities and instructional personnel;
>
> c. The potential effect of the specific placement of pupil upon his own educational progress and the educational progress of others in the same grade;
>
> d. Restriction of disruption of the individual educational process, limitation of disorganization of the public schools and achievement of maximum continuity in pupil placement by avoidance of any general or unnecessary reallocation or reassignment of pupils heretofore entered in the public school system;
>
> e. The validity of the reasons given by a pupil's parent, guardian or other persons standing in loco parentis for the particular placement requested.
>
> 2. The school board may adopt other regulations not inconsistent with the foregoing."

Superintendents of divisions electing to be bound by the State board regulations were required to transmit to the State superintendent a copy of the school board resolution recommending adoption of a local ordinance to that effect and a certified copy of the ordinance itself. Notice of that election was also to be sent to the pupil placement board. When such procedures were followed, the State superintendent transmitted to the division superintendent sufficient copies of the pupil placement application forms.

TUITION GRANTS

J. G. Blount, Jr., has been with the State board of education since 1931. He has been an assistant superintendent since 1961, in charge of administration and finance. For the years 1952 through 1961 he was director of finance. It was his task to prepare budgets, approve accounts payable and tuition grants.

In 1952 the State board promulgated regulations allowing the admission of children from other counties, cities and towns and establishing the maximum tuition rate.

In the past, the State of Virginia has provided scholarships to enable black students to attend institutions of higher learning in other States, when State institutions were closed to them by law.

The Virginia State tuition grant program was originally a product of the 1956 special session of the general assembly. The State board of education adopted regulations governing eligibility for tuition grants, in conformity with the legislation.

On September 5, 1958, the State Board of Education distributed to division superintendents regulations, adopted by it at a special meeting 7 days prior thereto, governing the payment of tuition grants. These regulations, in part, read as follows:

> Availability of tuition grants.
>
> Tuition grants will be available for pupils under the following conditions:
>
> 1. When all schools in a county, city or town are closed and not reopened by operation of law or by order of the Governor.
> 2. When one or more schools or parts thereof in a county, city or town are closed and not reopened by operation of law or by order of the Governor.
> 3. When a child or children assigned to or are in attendance at public schools wherein both white and colored children are enrolled and the parents of such child or children object to the assignment of such child or children and/or attendance at any school wherein both white and colored children are enrolled.
> 4. Upon the direction of the Governor in the discharge of the responsibilities imposed upon him by law.

Tuition grant payments were made payable by local school boards. "On the basis of an approved application, the school board shall authorize the issuance of school board warrants or checks drawn on the county or city treasurer for the amount of the approved application for tuition-grant aid at such times as are stated above." In addition, the regulations set forth minimum requirements for the schools which one using a tuition grant might attend. The application form, by regulation, also must show that, "If tuition grant aid is requested for a child who has been withdrawn by the parent or guardian from a public school in which both white and colored children are being taught, then such parent or guardian shall also certify that he objects to sending such pupil to a school in which both white and colored children are being taught." Local authorities in addition were advised that the State board of education would reimburse local school boards for the State's share of tuition-grant payments, as fixed in the State law.

Tuition grants were available to enable students resident in one school division to attend public schools in another school division. On occasion the number transferring from one school division to another one became considerable. On August 19, 1959, the State superintendent issued memorandum No. 3713 to division superintendents addressed to problems occasioned by these transfers:

> Whereas the nature and degree of transfer in attendance of pupils from the public schools of one locality to those of another can occasion undue hardship to the operation of public schools so affected, and

> Whereas the exchange of students between public school systems on the long recognized tuition basis is still effective and desirable,
>
> Be it Resolved that the school boards and division superintendents of schools of the sending and receiving localities confer on this matter and such understanding as will give priority to the transfer of students on the well established tuition plan which has been in effect for many years and thereby maintain the integrity of this practice, with due regard to the intent of the statutes governing the pupil scholarship program.

The foregoing passages are from a resolution of the State board of education.

In February 1959, tuition grant applications from 502 Norfolk resident pupils were approved, permitting them to attend school in South Norfolk. In March 1959, statewide, 5,000 applications had been received. Grants were sometimes made despite nonapproval of the schools to be attended, on account of "emergency conditions." Summer school grants as well were made for Norfolk residents. By June 1959, 6,453 applications had been approved on the school closing eligibility principle.

A committee of the State board of education had been appointed to formulate regulations to implement the tuition grant statute. They met with the office of the attorney general of Virginia and members of the staff of the State department of education and presented their report to the State board on February 4, 1959.

After their enactment, the State board of education distributed to local school divisions copies of the State's legislation setting up the pupil scholarship system. This statute was based upon the legislative finding that, "It is desirable and in the public interest that scholarships should be provided from the public funds of the State for the education of the children in nonsectarian private schools in or outside, and in public schools located outside, of the locality where the children reside, and that counties, cities and towns, if the town be a separate school district approved for operation, should be authorized to levy taxes and appropriate public funds to provide for such scholarships." Section 5 of the act reads as follows:

> The State board of education is hereby authorized and directed to promulgate rules and regulations for the payment of such scholarships and the administration of this act generally. Such rules and regulations may prescribe the minimum academic standards that shall be met by any non-sectarian private school attended by a child to entitle such child to a scholarship, but shall not deal in any way with the requirements of such school concerning the eligibility of pupils who may be admitted thereto. The State Board of Education may also provide for the payment of such scholarships in installments, and for their pro-ration in the case of children attending school less than a full school year.

Localities essentially had no choice in the matter of adopting a scholarship program. Section 6 of the act read as follows:

> If the governing body of a county, city or town authorized by Section 3 of this act to provide local scholarships fails to

> provide such scholarships for those entitled thereto, the State Board of Education shall authorize and direct the Superintendent of Public Instruction, under rules and regulations of the State Board of Education, to provide for the payment of such scholarships on behalf of such county, city or town to the extent hereinafter mentioned. In such event, the Superintendent of Public Instruction shall, at the end of each month, file with the state comptroller and with the governing body and school board of such county, city or town a statement showing disbursements so made on behalf of such county, city or town, and the comptroller shall, from time to time, as such funds become available, deduct from other state funds appropriated for distribution to such county, city or town the amount required to reimburse the state for expenditures incurred under the provisions of this section, provided that in no event shall any funds to which such county, city or town may be entitled under the provisions of Title 63 of the Code or for the operation of public schools be withheld under the provisions of this section.

The State board of education adopted regulations governing pupil scholarships on August 1–3, 1960. These, like the tuition-grant regulations, set forth minimum criteria for schools attended by applicants.

In October of 1960, the State board approved tuition grant applications from residents of areas which declined to appropriate funds for the purpose. Prince Edward County residents submitted 204 applications; all were approved.

In 1961, the State board of education transmitted to local school divisions forms upon which they might request reimbursement from the pupil scholarship fund for the State's share of tuition grant payments. Reimbursement was available on the basis of $125 for pupils in elementary schools and $150 for pupils in high schools.

In June 1962, new regulations on pupil scholarships were adopted by the State board, pursuant to 1960 legislation. Minimum requirements for schools attended by scholarship recipients were set forth. Local school boards were required to pay out the tuition money, if appropriated, and in any event to process applications. For 1962–63, $2,252,995.07 in grants were disbursed, excluding payments to Prince Edward County. The State board recovered, of this, $65,595.85 from the State comptroller; this money was taken out of State aid funds otherwise payable to areas which refused to pay tuition grants.

At a special meeting on July 1, 1964, the application deadline for tuition grants was waived for Prince Edward County residents for the past school year. On advice of the attorney general of Virginia, solicited by the State board of education, that a Federal court order against the processing of grant applications was no longer in effect, the board unanimously allowed retroactive applications.

On September 23, 1964, the attorney general of Virginia advised the division superintendent of the county school board of Amherst County concerning an Amherst resident's entitlement to a State tuition grant. The question posed concerned an Amherst resident to whom the school board of Amherst County had provided transportation within 100 yards of his home and for whom space is available in a "grade-A" Amherst County school. The individual, however, desired to attend a Nelson County school. The attorney general stated, "It is my opinion that there is no question but [the Amherst pupil] is entitled to a scholarship grant." A blind copy of this opinion letter was sent to J. G. Blount, Jr., of the State board of education.

In 1964, the attorney general of Virginia advised the Commonwealth's attorney for Sussex County concerning the tax consequences of tuition grants. He wrote:

> Moreover, I am of the opinion that receipt of a tuition grant under the provisions of Sec. 22–115.69, et seq., of the Virginia Code would not prevent the recipient thereof from being eligible to receive a tax deduction or credit under the provisions of Art. 3.1 of Title 58 and implementing local ordinance. In this connection, tuition grants authorized by the above-mentioned provisions of the Virginia Code are in no sense paid "directly or indirectly as a result of such contributions" to a private school within the scope of Sec. 28–19.4 of the Virginia Code.

In October 1965, the superintendent of public instruction transmitted to division superintendents a memorandum advising them of this Court's ruling in *Griffin* v. *State Board of Education*, under which payments in the form of tuition grants could not be made to pupils attending segregated schools predominantly maintained through such grants.

The attorney general of Virginia wrote to a Norfolk resident on May 9, 1966, concerning the administration of tuition grants for the Norfolk school division:

> As I am sure you are now aware, tuition grants for the school year 1965–66 will not be paid by officials of the City of Norfolk, and such payments will be made on their behalf by the State Board of Education pursuant to the provisions of the Virginia tuition grant law governing such situations. Information is currently being obtained with respect to the various private schools in the Norfolk area whose students are eligible to receive tuition grants, and it is hoped that payment of such grants can be authorized this week with disbursements actually made on or before May 20, 1966.

On August 12, 1966, by superintendent's memorandum No. 4877, J. G. Blount, Jr., director of the division of finance, issued instructions governing the use of pupil scholarship forms during the upcoming school year. He instructed division superintendents that if the local governing board makes no appropriation for scholarships, the school board should nonetheless check applications and send the originals to the State board of education. Blount further advised local authorities that they could make no payments to a pupil attending a racially segregated private school, if such school was predominantly maintained through pupil scholarships.

In a memorandum of September 16, 1966, Blount requested the Virginia superintendents to submit to him a list of private schools attended by pupils from their divisions, who had submitted applications for tuition grants. Blount stated that he would notify local officials "as soon as possible after we receive information which will enable us to clear the private schools insofar as predominant support is concerned."

By memorandum of September 27, 1966, Superintendent Wilkerson advised division superintendents of a new regulation concerning pupil scholarships. If local funds were not appropriated for the payment of a locality to share pupil scholarships, division superintendents were instructed to receive, process, and forward applications to the State board of education.

In July of 1967, further revised procedures for processing applications for pupil scholarships were instituted.

By memorandum of July 3, 1970, division superintendents were advised by J. G. Blount, Jr., that the general assembly had not appropriated further funds for pupil scholarships, "and, therefore, this program terminated as of June 30, 1970."

The Richmond School Board approved payment of pupil scholarship grants as a matter of course over the years. For all practical purposes, they had no choice.

No State board of education regulations prohibit the exchange of pupils on a tuition basis between two political subdivisions.

From the time of the first *Brown* decision to the present, $830,377.68 was paid in the form of tuition grants or pupil scholarship grants to residents of Chesterfield County. The State paid something over half this amount. From 1965–66 to the present, tuition grants in the amount of $461,659.53 were disbursed to Chesterfield residents. Again, the State reimbursed the county for over half of this amount.

From 1954–55 to the present, Henrico residents received $527,849.91 in tuition grants. The State paid $249,320.60 of this total. From 1965–66 to 1970–71, the State paid $150,021.30, and the county $136,093.64, for a total of $286,114.94, in tuition grants to Henrico County residents.

Richmond residents, from 1954–55 to 1970–71, received $339,102.07 in public tuition grants. Nearly $115,000 of this was paid by the State. From 1965–66 to 1970–71 the State paid to Richmond residents $49.863.68, and the city paid $97.096.55, for a total of $146.960.23.

During the period of the tuition grant and pupil scholarship programs, State and local agencies paid out $24.699,019.23 in such grants.

During the 1960–61 school session, it was the estimate of the superintendent that 460 Chesterfield residents might apply for scholarship grants available under Virginia law. He also estimated that the cost of such scholarships to the county would be $47,150.

In late 1960. the school board approved payment of 143 applications for pupil scholarship grants for 1960–61. A substantial number of the applicants were to attend Richmond City public schools, and about 50 were to attend private schools.

For the 1961–62 session. the superintendent estimated that 522 pupils would apply for scholarship grants. The estimated cost to the county would be $57.681.

In November 1961, the board of supervisors approved the school board's request for $25.928.28 for pupil scholarships for the then current semester. Funds allocated by the board of supervisors for the payment of these scholarships were to be kept "separate and distinct from funds appropriated for the operation of the public schools."

Exhibits PX 112, 117, 118, and 120, which the court accepts as accurate, reflect the substantial number of pupil tuition or scholarship grants made by the respective county defendants. In addition, the exhibits disclose amounts appropriated by the governing bodies for these purposes. PX 112 in particular shows the funds expended by State and local officials for tuition grants. Some of the grants were to students attending nonpublic schools.

Henrico County as well as Chesterfield approved grant applications by their residents. In many instances the grants were used by the recipients to attend Richmond City schools. In 1966–67 almost half of the grants used for Henrico students were to be used to attend city public schools.

In September of 1967 the school board approved further applications for scholarship grants for the 1967–68 year. Again, a large proportion of these were used to attend Richmond city public schools.

In October of 1968 the school board approved applications for scholarship grants by Henrico residents. A substantial number were to be used in Richmond schools.

In 1960, two blacks and 32 white from Henrico attended Richmond public schools under the State tuition grant program. In 1961, six blacks, 51 whites, and 27 of unknown race, residents of Henrico, came to Richmond public schools under the State tuition grant program and the special education program. In 1962, the figure was 10 blacks, 49 whites, and 27 of race unknown. In 1963, 72 whites, 10 blacks and 28 of unknown race, Henrico residents, attended Richmond schools under the two programs mentioned.

In 1964, the number was 57 whites, 10 blacks, and 22 of unknown race: in 1965, 63 whites, 13 blacks and 34 of unknown race; in 1966, 70 whites, 14 blacks, and 55 of unknown race. In 1967, under the tuition grant program, 84 white and 11 black Henrico residents attended Richmond public schools. Forty-nine whose race is not reflected in the record attended such schools for special education purposes. In 1968, 48 Henrico citizens enrolled in Richmond special education programs; that year 75 whites and 12 blacks from Henrico attended Richmond schools under the tuition grant program. In 1969, 49 blacks and one white from Henrico attended Richmond's special education classes, and 73 whites and 12 blacks from Henrico attended the regular Richmond schools under tuition grants. Commencing in 1970, use of the tuition grant was terminated. That year, however, 87 whites and six blacks attended Richmond special education courses; and in 1971, 113 whites and 10 blacks did so. Since 1962, Henrico County has also sent its residents, all white, to other school divisions than Richmond, in small numbers. Henrico residents have gone to Newport News, Chesterfield, Arlington, Virginia Beach, Martinsville, Williamsburg, Hanover, Bedford, and Powhatan schools.

State Department of Education

ATTITUDES AND EFFORTS RE DESEGREGATION

Since 1960, Harry R. Elmore has been a deputy superintendent in the State department of education. Since July of 1964 it has been his duty to administer the State's compliance with the 1964 Civil Rights

Act. Shortly after the passage of the act, Elmore went with the State superintendent to a briefing in Washington in the office of the U.S. Commissioner of Education. Afterwards, he was assigned by Dr. Wilkerson to the compliance task. Thereafter, Elmore, the only one in the State department of education assigned to desegregation matters, conducted a series of regional meetings with division superintendents of schools in the State.

Prior to the passage of the Civil Rights Act, in July 1964, no person in the State department of education was assigned to perform any functions or assume any responsibility relative to desegregation, nor was any affirmative action in this regard taken.

On November 9, 1964, superintendent's memorandum No. 4547 was issued to division superintendents from the superintendent of public instruction, concerning a special report. Dr. Wilkerson requested that the forms enclosed be returned within a week. Information on the integration of public schools was requested. Division superintendents were asked to advise the State of the number of schools in which only white children attended, the number of schools in which only Negro children attended, and the number of schools which were "integrated." To clarify matters, the form added that the total of the three classes should equal the total of the number of public schools in the school division.

In January of 1965, Woodrow W. Wilkerson distributed materials to division sperintendents related to title 6 of the Civil Rights Act of 1964. Thereafter a series of meetings of division superintendents was set up in order to acquaint them with the requirments of the Civil Rights Act. Simultaneously, the State department of education organized a conference for white teachers of high school chemistry in early 1965. At the same time, it organized the 10th annual health and public education conference for Negro teachers and school administrators in Norfolk. In February of 1965, the State department of education sponsored the fourth annual conference for white teachers of foreign languages, in Natural Bridge, Va.

On January 22, 1965, for the expressed reason that otherwise loss of Federal funds might result, the board authorized its superintendent to execute a statement of compliance under the 1964 Civil Rights Act.

On February 12, 1965, Woodrow W. Wilkerson signed, on behalf of the Virginia State Board of Education, an assurance of compliance with HEW regulations under the Civil Rights Act of 1964, title 6. This document guaranteed nondiscrimination in general terms in the practices of the State agency. The State board of education committed itself to make no new commitments of Federal financial assistance to school districts with desegregation plans under submission until so notified by the U.S. Commissioner of Education. The document continues:

> The State agency will take steps to secure an assurance from any agency to which commitment of Federal financial assistance has been made prior to January 3, 1965, on which installment payments are requested and, in the case of the refusal or failure on the part of any such agency to furnish the assurance (or the court order or plan where applicable), the State agency will promptly notify the U.S. Commissioner of Education.

Under the agreement the State agency also consented to keep records and submit reports from time to time as required by the U.S. Commissioner of Education to insure compliance. The department agreed to maintain all sources of information pertinent to ascertainment of compliance available for inspection at any time by Federal officials.

The State agency, in addition, agreed to suspend the practice of holding separate State level conferences for Negro and white school personnel as of September 1, 1965. Under the rubric "Methods of Administration To Assure Compliance," the State superintendent was given the authority to "advise with and secure from each State institution receiving Federal funds under programs administered by the State agency, the necessary and proper compliance form before further disbursement of Federal funds are made, with the exception of commitments made prior to January 3, 1965." He also agreed to keep the State board of education's director of finance advised on the compliance status of all school divisions.

The State superintendent agreed also to inform and advise local school officials receiving Federal financial assistance of the Civil Rights Act and the board's procedures for indicating compliance therewith. Another commitment was to "attempt to secure funds and employ such personnel as may be needed in the administration of the act."

Under the assurance given, any person could advise the State superintendent of public instruction of an instance of discrimination, giving a full report thereof. Upon receipt of such a report the State superintendent promised to request an explanation from the local school officials and to "advise with" the local board on procedures to alleviate any deviation from a compliance agreement filed by the local officials.

Annexed to its assurance of compliance under the Civil Rights Act of 1964, is a specific assurance that after July 1, 1965, all administrative and supervisory personnel at the State level will have been assigned office facilities without regard to race.

Until September of 1965, the State board of education still called racially segregated statewide conferences for teachers, principals, and staff.

In the latter part of March 1965, private attorneys were retained by the attorney general to render assistance to the Commonwealth and its localities in compliance with title VI of the Civil Rights Act. An assistant attorney general was also assigned to assist the State department of education in meeting compliance requirements.

By superintendent's memorandum of April 2, 1965, division superintendents were advised of the organization of secondary school principals' conferences for 1965. The first conference was scheduled for June 16–18 at Hampton Institute, in Hampton, Va. The second conference was set for June 21–23, at Madison College, in Harrisonburg, Va.

On April 19, 1965, Superintendent Wilkerson sent additional material concerning compliance with the 1964 Civil Rights Act to division superintendents. He advised local school districts that it was improper to file a form 441, as several had done, if the school division was still segregated.

On April 22, 1965, Superintendent Wilkerson distributed to all division superintendents a paper prepared by Gordon M. Foster, Jr., a consultant to the U.S. Office of Education, concerning southern school desegregation. Therein, Dr. Foster stated that "desegregation plans based on freedom of choice are perhaps no more than transitional devices that ultimately will give way to unitary zoning." He also said that, "desegregation of teachers and professional staffs is ultimately in the picture."

The superintendent of public instruction delivered to division superintendents copies of a speech by the Governor, objecting to certain aspects of the HEW guidelines. The then Governor had stated that HEW criteria, established to measure the effectiveness of free choice plans, in effect, worked to require a "racial balance." He also objected to "sweeping provisions with respect to faculty and staff desegregation."

On May 7, 1965, the Fairfax City school division superintendent advised the director of the equal educational opportunities program of the Department of Health, Education, and Welfare that the city of Fairfax provided education for its residents under a tuition contract with Fairfax County. "The school board of Fairfax County," he added, "determines all policy relative to the education and transportation of pupils resident in the city of Fairfax." Fairfax County's plan having already been accepted, the superintendent therefore solicited approval of it insofar as it affected city pupils.

On May 24, 1965, Harry Elmore was advised by the superintendent of the Fairfax City school division that he had advised the U.S. Commissioner of Education that students resident in the city of Fairfax would attend schools under the desegregation plan of Fairfax County.

On June 1, 1965, Harry Elmore transmitted to Dr. Wilkerson a memorandum concerning HEW regulations governing program grants. He was critical of the Federal department for its alleged interference in the administration of the State program. Concerning the "program analysis form" he stated, "This is another example of HEW assuming the role of judging a State program. Federal control is very evident. Section 504 of title V sets forth four criteria for approval by the commissioner of State applications for funds, all of which are routine except sub (a), which astoundingly places upon the commissioner the determination of whether the State educational agency possesses the 'ability' to participate effectively in meeting the educational needs of the State!" Elmore continued, "In summary, I feel that the information requested in support of the State application for funds under title V goes beyond the purview of the commissioner's authority provided in the act and constitutes Federal control which is prohibited under section 604 of the act. You probably will not want to say these things; however, I would suggest that the forms be reduced in amount of detail which is nonessential to giving the commissioner a reasonable basis for the approval of State plans."

On June 2, 1965, the attorney general responded to a letter sent him by an attorney concerning the application of HEW desegregation guidelines, and said:

> In Virginia, the question of whether or not a locality will comply with the directions of HEW is being left to each locality. This office has been trying to find out from HEW exactly what their requirements are and then passing this

> information on to the localities, most of which are represented by their own counsel. The decision is then that of each locality.
>
> I have serious doubt as to whether any locality would want to initiate proceedings itself to get under a court order. If a locality refused to comply with the requirements of HEW and an independent suit is brought against the locality, . . . the locality may be better off in court than in complying with the regulations of HEW. This, however, is the decision of each locality acting in accordance with the advice and recommendation of its local counsel.
>
> I might add that a good many of the localities have employed counsel from the city of Richmond who are familiar with previous litigation in this field.

On June 4, 1965, Harry Elmore forwarded to Francis Keppel, then commissioner of education, copies of desegregation plan for Henrico and Tazewell counties. He stated that the Henrico County plan had been reviewed by Edward A. Mearns, and solicited the plan's approval.

On June 21, 1965, division superintendents were advised by the State superintendent of State assistance in negotiating desegregation plans. He advised them that private counsel as well as an assistant attorney general would be available to assist localities in the event that they were invited to confer with the U.S. Office of Education, concerning compliance with the Civil Rights Act. Wilkerson added, "The Commonwealth of Virginia will pay the costs incident to such legal services."

In July of 1965, division superintendents were advised by the State board of the various technical services available under title IV of the 1965 Civil Rights Act to assist them in the desegregation process.

In June and July of 1965, the State board of education held school lunch conferences at Radford College, for white school personnel, and at Virginia State College for Negro school lunch personnel.

By memorandum of July 30, 1965, Superintendent Wilkerson requested that division superintendents engaged in correspondence concerning desegregation plans with HEW, transmit copies of such materials to Harry R. Elmore, assistant superintendent of public instruction, and also to whichever of the three State-assigned attorneys advised the local school division in conferences with HEW. Wilkerson stated that he needed this information "to assure closer liaison with the school divisions in meeting compliance requirements."

On August 19, 1965, Tinsley L. Spraggins, of the technical assistance branch of the equal opportunities program, wrote Dr. Wilkerson concerning the possibility of a program, previously discussed between the two, to acquaint division superintendents with the services available under title IV of the 1964 Civil Rights Act. He requested another meeting in order to establish the procedures for such a conference. Dr. Wilkerson replied by letter of August 25, 1965, that it would not be feasible to hold such a conference during August, September nor October. He did state that he had advised division superintendents of the technical assistance available by means of a memorandum. Copies of Dr. Wilkerson's letter went to the State attorneys.

In 1965, an attorney who had been designated by the office of the attorney general of Virginia to assist Virginia school divisions in meeting the compliance requirements of the Department of Health, Education, and Welfare, wrote Superintendent Wilkerson the following letter:

> As we end the ordeal of negotiating compliance plans for the various school divisions in Virginia, there is one matter that is giving me considerable concern. You will recall at all of the group meetings, we have told the various supervisors that in our opinion the free choice plan was calculated by HEW to be an interim solution that would give way in the not too distant future to geographical zoning. I am now more concerned about this than ever and I see signs in Washington that lead me to believe that HEW will push for unitary school systems without much further delay. For this reason, it occurred to me it might be well to suggest to the various superintendents and the school boards that they give consideration to one or two alternatives.
>
> First, make sure that their plan is a complete, uninhibited free choice with no vestige of discrimination and prepare themselves to support such a plan in the Federal court, or, two, begin to plan toward the establishment of a unitary school system based on nondiscriminatory geographical zones.
>
> If you wish to discuss this matter more fully, I will be glad to meet with you at your convenience. Also, if you think it might be helpful, you may enclose a copy of this letter with your communication to the various divisions.

Dr. Wilkerson responded to the effect that during regional meetings held with division superintendents, it had been clearly stated that compliance on the basis of a free choice plan was regarded by the office of education to be a transitional step. Therefore, he stated, he had tentatively decided not to transmit to division superintendents a memorandum concerning compliance in the future.

In December of 1965, a State senator wrote to the Governor concerning the experience of his school division in having to negotiate directly with the Department of Health, Education, and Welfare concerning compliance with title VI. "In doing so, the superintendent, the chairman of the school board, and another member of the school board, made several trips to the Department of Health, Education, and Welfare in Washington, and, I may say, Hampton was one of the first school divisions to receive approval for its plans and disbursements of its funds. The writer added, "It would appear to me the State government should take the leadership in this matter and frankly, I think I can state the Hampton School board would have preferred to work with the State in this problem and not have been forced to take unilateral action by going directly to Washington." He asked that a full-time official be assigned from either the Department of Education or the Attorney General's Office for liaison with the local school boards.

The Governor replied that special counsel had been retained for these purposes, rather than employing a regular staff member from inside the government; and stated, "The threat to the continued operation of the schools should Federal funds be cut off posed a most serious problem which, in my judgment and that of the attorney general, fully justified the immediate employment of special counsel."

George Moody, the then superintendent of Henrico County Public Schools, wrote Woodrow Wilkerson on April 14, 1966, concerning the desegregation of the Henrico County schools. "During the current session," Moody stated, "under a combination of geographic zones around white schools and a freedom of choice, 19.7 percent of the Negro pupils are enrolled in predominantly white schools. No choice made by any Negro parent for his child was denied." Moody expressed dismay that representatives of the Office of Education had informed him that Henrico would no longer be able to use a freedom of choice plan. The county's position was that 1 more year of operation under such a plan would be necessary; otherwise, because an $11 million school construction program was soon to be completed, a change in attendance plans at that point might mean that some children would attend three different schools in 3 successive years. Moody accused the U.S. Office of Education of acting "arbitrarily" and without regard to the specific problems "we are facing."

In 1966 the U.S. Commissioner of Education distributed a memorandum on April 25 to chief State school officers concerning nondiscrimination in the operation of summer school programs. Commissioner Howell noted, "If a school district plans to conduct the same or similar activities at more than one location, an evaluation must be made to determine whether this separation is justified on same basis other than the maintenance of segregation." He added, "In making this evaluation the State educational agency should consider the racial composition of the teaching staff, whether the school at each location is thought of by the public as being for white or Negro children and whether the activities could be conducted at one location where members of both races would feel free to attend."

On April 29, 1966, Harry Elmore distributed an informational release to all division superintendents concerning civil rights compliance in summer programs, and included a copy of the Commissioner's communication aforementioned.

On September 1, 1966, Harry Elmore circulated to division superintendents a copy of the Governor's statement to the Secretary of HEW and the U.S. Commissioner of Education, wherein the Governor protested the conduct of HEW "review teams," who made "demands on the very eve of the opening of the school session, threatening to disrupt plans already perfected or force delay in opening the schools this fall." The Governor specifically urged the Office of Education to withdraw or defer the review team's demands for the school year, and to institute further review by teams of "broader experience and greater maturity."

In September 1966, the State board deferred transmission of Federal funds, on instructions from the U.S. Office of Education, to seven counties not in compliance with the Civil Rights Act. No further action was recorded.

When Elmore received a letter from Superintendent Moody of Henrico, of September 28, 1966, informing him that Henrico would not cooperate with HEW in the matter of faculty desegregation, he took no action. "I did not take action because the compliance under title VI, the effectuation of a desegregation plan, resides with the local school board. We come in upon request."

In September of 1966, the State board requested that division superintendents supply them with copies of all letters sent to and received from the Office of Education.

On April 20, 1967, apparently in answer to an inquiry, Harry Elmore wrote an Assistant Attorney General to advise him that after review of the State board's files concerning title VI, he was unable to find "anything in writing which relates to unreasonable demands placed upon the local school authorities by the HEW" Mr. Elmore added, "Our office has maintained a liaison relationship with the school division and HEW. We have attemped to keep local school officials informed with respect to HEW regulations and instructions pertaining to compliance with title VI and to assist those localities desiring to meet the requirements of HEW for receipt of Federal funds."

Peter Libassi, the Director for the Office for Civil Rights of the Department of Health, Education, and Welfare, sent a memorandum of February 27, 1968, to chief State school officers of southern and border States where free choice desegregation plans might be in effect. He discussed procedural matters and added, "It should be understood that the free choice plan is an acceptable means for eliminating the dual-school structure, only if it is effective in accomplishing that objective."

On June 20, 1968, Lloyd R. Henderson, Education Branch Chief for the Office for Civil Rights, advised Superintendent Wilkerson that administrative enforcement proceedings were being commenced against the Henrico County public schools and asked him to instruct the staff to commit no further Federal assistance until further notice. Dr. Wilkerson also received a copy of a letter from Ruby G. Martin, Director for the Office of Civil Rights, to Mr. Moody, the Henrico superintendent, advising Moody that after a study she had concluded that Henrico's desegregation plan "is not adequate and is not working effectively to accomplish the elimination of the dual school system."

According to Elmore, there was "very close liaison" between the Department of Health, Education, and Welfare and his department, although Mr. Elmore said he wouldn't subscribe to the word "cooperation" in describing the spirit with which he and HEW worked. The facts show, however, that even in the minor area of transmission of information this liaison had its limits. In early 1969, the Justice Department, through HEW, sought to secure statistics and maps concerning three Virginia school divisions. Elmore advised the recipient of this request, "Call Severson (of HEW) and suggest that requests be made in writing from the Justice Department or her office to divisions to furnish specific information, sending copies to the superintendent of public instruction. If the localities refuse, write the superintendent of public instruction requesting that our department furnish the information. In this event, we would supply items 3 and 4 and say that we do not have 1 and 2; that the department does not keep such detailed records, that the same are available only through the local school authorities." In fact, the State board of education did have student and faculty desegregation figures for the preceeding fall. Elmore assumed that they wanted later facts. His memorandum continued, "Should Severson insist that we secure the data from the local districts, state that the compliance agreements are between HEW and the local school districts, and if they refused to supply the Justice Department or HEW, our department is not in any position to coerce the districts into supplying the data. Coercive action should be applied by the Federal Government for whatever ends are justified and lawful under the Civil Rights Act and Federal regulations." Elmore was reluctant to use the State board's authority to secure such data because he did not want the office to "adopt a stance or posture of being a means of getting information that HEW should get from the locality." He feared that some division superintendents might resent such action. Thus, the State board bowed to considerations of internal administrative politics and failed to perform this slight affirmative act to facilitate the process of desegregation.

Elmore expanded his memorandum:

> In addition, I have the following thoughts:
>
> The State board's compliance agreement does not require our collecting data from the school divisions for transmittal to HEW. Our role with localities is to advise, consult, inform and encourage compliance. We are required to submit information as may be requested by the Commissioner as it affects the board's compliance in its department operations.
>
> The guidelines (regulations of HEW) require that localities submit supplementary information as may be requested by HEW.
>
> I do not think it is sound, politically or otherwise, for the department to assume the role of a coercive collection agency for the Federal Government in instances where local school systems refuse to supply the information and are willing to forego Federal aid. The Federal Government has ample authority to exercise over localities if it desires to institute suit through the Justice Department to place such localities under court order desegregation plans. It would be ill-advised, in my judgment, for our department to aline itself with the Federal Government in this confrontation with Accomac, Nansemond, and Westmoreland.

The attitude of the sole man in charge of desegregation efforts in a State department of education, therefore, was consistent with compliance with the contract agreement his office had signed, no more. Activities beyond the scope of that agreement were to be governed by considerations of political wisdom, or at the very least the attitude was that school divisions, if they complied with title VI of the Civil Rights Act, did so "simply to get Federal funds," and if they didn't want Federal funds they didn't have to submit information HEW wanted, and he found it diplomatically sound not to do any more than absolutely required.

On January 4, 1970, the Department of Health, Education, and Welfare distributed an analysis of 1968 national school attendance patterns. This publication came to the attention of Mr. Elmore and others in the State board of education. It shows that in the fall of 1968, although 23.5 percent of the total students in the schools of the State of Virginia were black, 58 percent of them were in 100-percent minority schools, 65.8 percent of them were in 99- to 100-percent minority schools, 73.1 percent were in 50- to 100-percent minority schools, and only 26.9 percent of them were in schools with a minority component below 50 percent. The survey also showed that 54 percent of "nonminority" students in Virginia were in schools containing 95- to 100-percent "nonminority" students. Only seven-tenths of a percent of that group were in schools with less than 50 percent "nonminority" pupils.

On February 20, 1970, the Office for Civil Rights of the Department of Health, Education, and Welfare advised Superintendent Wilkerson to make no further commitments for Federal assistance to the school board of Newport News.

On February 26, 1970, Mr. Elmore wrote to the superintendent of the Newport News city schools that the State department of education had been notified that no new commitments were to be made to the Newport News city school system for new elementary and secondary education activities until the Office for Civil Rights advised otherwise.

On July 2, 1970, the Assistant Attorney General in charge of the Civil Rights Division of the Justice Department wrote the State superintendent of education to call his attention to the responsibility of the State and its agencies in insuring school desegregation. He stated that the Attorney General had received complaints from five school districts in Virginia concerning racial dscrimination and considered the State board of education to be the "appropriate agency to be called upon to adjust the conditions of unlawful segregation." He asked Dr. Wilkerson to assure him that procedures have been established to insure that full desegregation plans would be implemented within the five-named school districts in 1970 and 1971.

Dr. Wilkerson replied to Jerris Leonard's letter of July 2, 1970, advising him that the State board would work with officials of the school divisions complained of, and that he hoped that in a reasonably short time the areas would be committed to full desegregation. He asked that the nature of the complaints of discrimination be set forth in greater detail.

In the case of Suffolk, Elmore conferred with the division superintendent concerning an all-black elementary and junior high school to which HEW had objected. Elmore studied the situation and recommended reconstituting the all-black school as a junior high school. In August of 1970, the Suffolk City School Board took action in conformity with the recommendation. Subsequently, it was found in compliance with the Civil Rights Act by HEW.

On July 15, 1970, Elmore advised Jerris Leonard of his progress in discussing desegregation matters with the Newport News school officials. That day Elmore had suggested that the school board undertake, in lieu of a free-choice plan for high schools, to assign pupils by one of three zoning systems. One of his suggestions was "Noncontiguous zoning whereby a block of Negro children would be transported from the ghetto area into the suburbs." Mr. Elmore, however, was careful to emphasize that this was not a recommendation of the department of education. It was solely a suggestion that emerged from discussions.

The State department of education did not apply for a Federal grant in order to set up a central staff to give technical assistance to local school districts in desegregation until late 1970. It was Elmore's judgment that the desegregation task had to be divided into two parts. First, the State board undertook to bring about formal compliance with the Civil Rights Act; only after this had been accomplished, in the State's view, throughout the State, were people brought in to help the school divisions solve the educational problems involved in desegregation.

Elmore described a "good working relationship" which he attempted to preserve between the State department and division superintendents:

> I must say that some of them were extremely sensitive throughout this whole period. They did not appreciate one bit the Department's attempting to thrust any part of the plan upon them until they were prepared to accept it. We encouraged them. We worked with them. We advised. We informed. But we never once moved in and said, "You have got to do this or you have got to do that."
>
> This might have been a little thing, but it could have triggered something in a community that could have backfired on our good working relationships.

Elmore's conception—and it must not be forgotten that he was the only man in charge—of the State board's duty was confined strictly to the terms of the assurance of compliance that his department had signed. This bound him, as he saw it, solely to assist and inform localities in effecting compliance.

Robert T. Green has been special assistant in the State department of education for desegregation since February 1, 1971. He was the first employee in the title IV unit of the State department of education. Funds for such an official have been available for approximately 5 years now. He has a staff of three and a secretary; his office is funded in the amount of $77,000.

He assists and advises local school districts in solving desegregation problems. He has not had occasion to utilize the services of the State Department of Education in making transportation surveys in connection with desegregation.

In applying for the grant which funded Green's office, the State department of education represented to the U.S. Office of Education that it would assist in drawing schoolbus routes. Dr. Green's office would be available to work with a hypothetical metropolitan area school authority, utilizing all the technical services of the State department, to assist it in desegregating the schools within his jurisdiction. Federal funds are also available for this purpose.

The State board of education and the superintendent of public instruction laid great emphasis upon their consistent policy of informing local school divisions of requirements of the Department of Health, Education, and Welfare concerning school desegregation. Of course, this was a requirement of the assurance of compliance executed on behalf of the State board. During the massive-resistance years, the State board of education zealously and speedily communicated to local school divisions the most recent State enactments designed to frustrate desegregation. By contrast, during the years from 1965 on, during which the State board was assertedly working to bring about compliance with HEW requirements, it did not undertake to disseminate to division superintendents the substance of the requirements of even the most important decisions of the U.S. Supreme Court in the field of school desegregation, much less those of lower Federal courts.

Elmore could recall very few instances in which the State department of education had advised division superintendents of the gist of recent Court decisions on desegregation, as opposed to transmitting memorandum concerning changes in HEW regulations. For example, no release, apparently, was issued after the U.S. Supreme Court decided the *Green* v. *County School Board of New Kent County* case.

Although the assurance of compliance itself required the State board to "secure" compliance agreements by school divisions, its work with them fundamentally was initiated only upon request of local authorities. More important, apparently, than desegregation, was the preservation of a smooth-working relationship with the localities.

The Court has already noted that the State board of education would provide the services of one of three attorneys retained for the purpose to any school division involved in negotiations over compliance with HEW requirements. In addition, the State, by statute, makes provision for payment from public funds of litigation expenses incurred by public agencies in defending lawsuits concerning school segregation. From 1955 to 1971, the State has paid in total legal fees and expenses—compiled from records of the State attorney general—the sum of $769,932.53.

John F. Banks, associate director of secondary education in the State department of education, reported to a U.S. Senate Select Committee on Equal Educational Opportunity in mid-1971 concerning the process of school desegregation and the decline in the number of black secondary school principals in Virginia:

> In 1965, 10 years after the 1954 Supreme Court decision, there were still 77 black secondary schools in 73 counties, and 30 black secondary schools in 27 cities of Virginia. Each of these 107 black secondary schools had a black principal.
>
> Today there are only four counties in which the black secondary school plans are even used to accommodate all secondary students, and the number of black principals has dwindled to 17.
>
> The greatest change occurred in 1969, when school divisions, either by Court order or apparently because of pressures from the Department of Health, Education and Welfare, went to unitary school systems. The usual pattern was to close or to reorganize the black secondary school. This meant, in most instances, a change in the status of the principal. Sometimes he was reassigned, "demoted" to an elementary or junior high school principalship. More often he was removed entirely from policymaking positions. Many reassignments were to the classrooms. Often, the black principal was given a pseudo-promotion to the central office, which in reality is only a "dead-end street."
>
> The impact of these changes is of particular concern because of its debilitating influence on educational aspirations of the black community.

The State board of education is informed at least yearly by school census reports of the racial composition of faculties in school facilities.

REGIONAL SCHOOLS

On January 11, 1946, the State board of education tentatively approved a grant of $75,000 from the vocational capital outlay fund for purposes of constructing a regional Negro high school for Orange, Madison, Green, Rappahannock, and Culpeper Counties. On February 21, 1946, the board took final action to recommend the appropriation to the Governor. At the meeting of July 15, 1947, the State board of education granted the request of the school boards of Albermarle County and the city of Charlottesville for approval of a plan to establish a joint school for blacks in accordance with the State board's regulations covering joint school operation.

Subsequent to the decision in *Brown* v. *Board*, the State board of education took no action to withdraw its approval of the operation of these joint schools nor of the transportation programs used in connection with them.

The State board of education never expressed any disapproval of the practice of crossing political subdivisional lines by students attending these regional school.

By memorandum of January 8, 1947, the State board of education endorsed, among other things, the creation of a number of regional vocational schools. For such purposes the board proposed that groups of school divisions cooperate to own and operate such facilities as joint schools. Such facilities were to be open to whites only, and their sites were selected upon that premise. The memorandum states:

> Nine centers have been tentatively selected on the basis of geographical distribution and concentration of industries in which the practicability of establishing and operating such joint schools for white students will be fully explored.

In order to develop vocational training for blacks, the State board proposed to use funds from the special State vocational capital outlay fund to establish vocational training centers at regional high schools for blacks, at proposed comprehensive high schools in areas of the State with more concentrated black population, "with the regional vocational schools for Negroes probably limited to not more than one or two centers."

In a document published by the State board of education in 1947, entitled "A Comprehensive Program of Education for Virginia's Public Schools," regional high schools of general curriculum were discussed. The following is an extract from that document:

> Regional high schools. In certain areas of the State, particularly in the Shenandoah Valley, northern Virginia, and the southwest, on account of the small and scattered Negro population regional high schools serving groups of school divisions will be necessary in order to provide comprehensive programs of education on the secondary level for Negro boys and girls. Negro high school pupils may be transported daily to those schools from adjoining counties and cities when practical and when the distances involved are not too great. However, if all of the Negro secondary school pupils in such areas are to be served, comfortable and adequate dormitory and

> boarding facilities must be provided at these regional high schools with the parents and school boards sharing in the boarding expenses for such pupils.
>
> The movement to provide higher educational opportunities for Negro youths through this development of regional high schools in those areas with small and scattered Negro population has the endorsement and support of the State department of education. Considerable progress has already been made in this direction, yet much remains to be done to meet more adequately the educational needs of Negro youth in these sections of Virginia.
>
> The regional Negro high schools at Manassas and Christiansburg have pointed the way, and the recent cooperative action by the counties of Culpeper, Madison, Orange, Rappahannock, and Greene in approving such a regional high school to be constructed in Culpeper County in the near future for their Negro youths is worthy of commendation to other sections of the State facing the same problem.

On May 6, 1949, the superintendent of public instruction transmitted to division superintendents, for their information, a copy of the opinion of the U.S. District Court for the Western District of Virginia in *Corbin* v. *County School Board of Pulaski County*, Civil Action No. CA–341, "which establishes the legality and constitutionality for jointly owned and operated high schools which do not have to be within the geographical boundaries of the county." Interestingly, Judge Barksdale, in that opinion, points out that some "buses transporting white children . . . have scheduled trips of more than an hour and a half each way.

The State board approved the salary of the superintendent of Christiansburg Industrial Institute in 1949.

The State board in 1949 promulgated detailed regulations for the operation of jointly maintained and financed schools. These covered the selection of members for the committee of control, the selection of staff, budgeting, and financial support.

The board approved for recommendation to the Governor such special appropriations as were necessary to equip a joint high school for Negroes run by Charlottesville and Albemarle County.

In 1950, the board approved the construction of segregated joint schools by Lancaster and Northumberland Counties.

In July of 1955, the State board gave specific approval to the expansion of facilities at the Carver black regional high school, serving Culpeper, Madison, Orange, and Rappahannock Counties.

The approval of the State board of education was required by law for the establishment of joint schools. (Va. Code Sec. 22–7)

On January 26, 1956, the board of Education approved a contract between Rockbridge County and the town of Lexington for the establishment and operation of a joint high school.

From 1940 through 1968, at least four regional all-black schools were operated in the State of Virginia. These were joint schools, requiring the approval of the State board of education. For the most part, black students were bused to these schools, although in some instances, dormitories were employed. Students at these schools apparently were at home only on weekends.

The enrollment at these regional black high schools is set forth in plaintiffs' exhibit 109. This information was amassed by means of the State board of education's usual procedures of statistical compilation, and the Court finds it to be reasonably accurate.

As it did in other instances when buses were used to transport students to school, the State financed a substantial part of the pupil transportation. Approval was required on an annual basis before such disbusements are made.

PUPIL EXCHANGES

Since 1960, there has not been a school year in which several Richmond City residents did not attend school in a division other than Richmond. Thirteen Richmond students attended Henrico schools in 1962; 10 in 1963; 17 in 1964; 24 in 1965; 26 in 1966; 18 in 1967; 12 in 1968; and 14 in 1969. Since that year, Richmond has sent students only to Chesterfield County, in connection with the recent annexation. The races of each of these students is unknown. Since 1962, Richmond has sent a small number of students, race unknown, to Chesterfield County schools.

Annexations to the city of Richmond have been brought in the following additions to the city's school population:

1906—1,245 white, 6,444 black.
1909—1,082 white, 541 black.
1914—2,565 white, 308 black.
1942—1,721 white, 307 black.
1970—6,616 white, 237 black.

In addition, 136 blacks and 3,251 whites, residents of the area annexed in 1970, currently attend school in Chesterfield County under an agreement between the two jurisdictions, which has been discussed in prior memoranda of the Court.

The defendants point out that the city of Richmond rejected in 1965 an annexation award which would have brought into the city 8,047 white and 125 black students. This is true. The rejection, of course, was made by the city council of the city of Richmond, a defendant herein. It was also made at a time when the schools of each political subdivision here involved, including Chesterfield, were undeniably segregated.

The chairman of the city school board was, at trial, unaware of the current position, if any, of the Richmond City Council on the issue of school consolidation, and there has been no evidence in this record sufficient to enlighten the Court.

The decision of the Richmond School Board to seek quality education in the Richmond metropolitan community, by means of desegregation involving the adjoining counties, sprang partly from this Court's earlier desegregation orders addressed to the Richmond City School Board alone and partly out of a history of cooperation between school divisions in the area.

Richmond, Henrico, and Chesterfield have cooperated in the establishment of a training center for mentally retarded trainable children. It is funded on a per pupil basis. Currently facilities operate in the Virginia Randolph School in Henrico County and in the Hickory Hill

School on the south side of the James River, both formerly all-black schools.

The three school divisions also cooperate in operating a mathematics-Science center along with two other school divisions, Goochland and Powhatan Counties. It also is housed in the Virginia Randolph School facility.

Children are taken to each of these programs from all over the metropolitan area by schoolbus.

A technical center also operates in Richmond under a cooperative scheme involving the three school divisions, and others.

The Richmond public school system has always had difficulties maintaining high quality education in majority black schools.

During Mrs. Crockford's tenure on the Richmond City School Board, that body has always felt a duty to comply with policies directed by the Virginia State Board of Education. If that body directed the local school division to take action to alleviate segregation in the public schools, local officials would have complied. However, the State board took no affirmative steps to direct desegregation.

Guidance from the State level instead took the form of the creation of the pupil placement board and the tuition-grant system. Under the latter procedure, as the Court has found, the city of Richmond has exchanged students with Chesterfield and Henrico Counties and has sent some to private schools. On November 21, 1967, the Richmond School Board approved a tuition grant for a resident to attend a facility operated by the Prince Edward School Foundation in Farmville, Va.

The School Board of the City of Richmond has never requested that the State board of education direct the consolidation of school divisions in the area. As Mrs. Crockford stated, it seemed rather a hopeless effort. Board members felt that the adjoining counties would not respond positively. In such a situation, Mrs. Crockford stated, opinion was that the State board of education would not be responsive to Richmond's request, and the Court having heard the evidence, concurs in this conclusion.

In spite of all parties having been given ample opportunity to prepare for the case, and in spite of the opportunity to do so none of the defendants have suggested any consolidation plan in lieu of the one developed by Dr. Little, the Court is satisfied from the evidence that given the attitude of the defendants the securing of the constitutional rights to which the plaintiff class are entitled will not be accomplished except under the supervision of the Court.

TRANSPORTATION

In 1942, when wartime conditions led to a shortage of schoolbus units, the State board of education suggested to division superintendents that if schools were operated on a staggered schedule, a more economical use might be made of existing equipment.

In October of 1946, in a policy statement concerning school consolidation, the State board of education recommended that high school students be transported no more than 90 minutes, one way, and that for elementary students the maximum should be 50 minutes.

In 1955, the State board issued detailed recommendations for the operation of schoolbus systems.

In 1957, the State supervisor of elementary education undertook to survey the State to determine the number of schoolchildren in each division whose schoolday was extended because they had to await bus transportation by virtue of their bus having to make the circuit of several routes prior to transporting them. All superintendents were requested to complete a form giving information on the topic.

In December 1960, the board issued its mandatory general regulations and recommendations on pupil transportation. Included in the regulations was one that permitted children to stand in the aisle back of the driver's seat for trips of short distances.

On February 4, 1966, Woodrow Wilkerson advised division superintendents of a new regulation concerning distribution of State pupil transportation funds. Thereafter, reimbursement by State funds for transporting pupils from an adjoining school division would be available when the procedure had been established by mutual agreement of the school boards of the two school divisions.

CROSSING STATE, CITY, AND COUNTY LINES

From the school year 1954–55 through the beginning of 1970–71, Virginia students have attended both public and private schools in other States, both within and beyond commuting range of their homes, with tuition and/or transportation payments made from public funds. Compilations secured from replies of local school boards to the State board of education are found in PX 110 and 111. Where the race of the respective student can be ascertained from the exhibits, it is apparent that with rare exception blacks and whites have been assigned to separate schools.

The purpose of the practices aforementioned, including the transporting of students great distances, were, except in those instances involving special situations such as the Washington, D.C., Private School for the Handicapped, to preserve segregated schools.

Children have been transported to and from North Carolina, West Virginia, Washington, D.C., Maryland, and Tennessee.

Obviously some of the instances were by virtue of the tuition grant and pupil scholarship programs. Others have been by virtue of arrangements made between a local school board and the school authorities in another State, but all with at least tacit approval of the State board of education. No expression of disapproval of the practice of transporting students across State lines has ever been made by the State board of education.

From 1940 through 1965, black schoolchildren in Frederick County attended schools in Winchester for the stated reason that there was no black high school available in the county, and also for reasons of proximity. In 1961 through 1969, white students from Cumberland County were sent to school in Powhatan and Prince Edward Counties, their tuition paid by Cumberland, for the purpose of avoiding integration.

From 1948 through 1967, black high school pupils of Orange County were sent to George Washington Carver regional high school, in Culpeper. About 200 students were sent each year. Each year from 1953–54 through 1964–65, Dickinson County sent approximately 23 black pupils to secondary school in Russell County, because Dickinson County did not have a high school for blacks. Simultaneously, beginning in 1962, white Dickinson elementary pupils went to Russell County schools for reasons of proximity. The transportation of white pupils continued at least through 1970–71.

From 1950 through 1965, approximately 20 black pupils each year were sent out of Bland County into Tazewell County to attend public schools. This was because Tazewell County operated the nearest school open to people of their race.

From 1945 through 1965, about 20 Bath County black residents were regularly sent to school in Alleghany County on a tuition basis because, according to Bath officials, there was "no high school" available for them in Bath. From 1965–66 on, none were sent out of the county, for the stated reason that schools were "fully integrated." Bath County also sent white pupils out of its jurisdiction in 1958 and 1959 for reasons of proximity.

From 1948 to at least through 1964–65, Greene County black residents were sent on a tuition basis to school in Albemarle County because there was "no Negro high school in Greene County." At the same time lesser numbers of white pupils attended schools, tuition paid, in counties surrounding Greene by reason of parental choice. After 1964–65, Greene County officials are unable to supply the information on attendance outside of the county. For these years they report solely, "pupil scholarships sent directly to State." (PX 94, at 25-26) During this period the State board issued the grants. From 1940 through 1966 black residents of Buena Vista City attended the Downing High School in Lexington under a contract arrangement.

From 1940 through 1963, Shenandoah County blacks desiring to attend high school were sent, on a tuition paid basis, to the city of Winchester, the city of Charlottesville, Prince William County, or the city of Harrisonburg because Shenandoah County did not operate a high school for Negroes.

From 1941 through 1959, small numbers of blacks were resident in Giles County and were sent to Montgomery County to attend high school because there was no program for blacks in Giles County beyond the 10th grade. In the meantime, larger numbers of whites attended school in Bland County, tuition also paid by Giles County, for reasons of proximity. The transportation of whites into Bland County continued at least through 1971.

According to a very recent report submitted to the State board of education:

> Prior to 1958, Alleghany County and the city of Covington comprised one school division. When they separated in 1958, the county was left with no high school and consequently sent all secondary students to Covington, Clifton Forge, or Bath County on a tuition basis. In 1963, Alleghany High School opened for white high school students only. Negro high school students continued to attend the Negro high school in Covington. Also, a few other students, white and black, continued to attend school in Bath County, Covington,

> or Clifton Forge because nearby Alleghany County facilities were not yet available.
>
> In 1965 such facilities were ready for use and both school divisions at the same time completely integrated.

Ninety to 100 black residents of Alleghany County attended school in Covington.

From 1948 through 1964–65, about 150 black high school pupils per year were sent on a tuition basis to high school in the town of Lexington because Rockbridge County offered no high school program for blacks. Rockbridge County also sent about 125 white pupils to Lexington schools through 1960 to relieve overcrowding.

From 1960 through 1968–69, Powhatan County public schools sent small numbers of white pupils, tuition paid, to public schools in Chesterfield County, the city of Richmond, and Goochland County, on the request of parents.

From 1959 through 1964, about a dozen Tazewell students, all white, attended Russell County schools for reasons of proximity. During the period 1959 through 1970 about 45 Tazewell white residents attended Smyth County schools, again for reasons of proximity. From 1959 through 1964, Tazewell County black students, at a rate of about 10 per year, attended Excelsior High School in McDowell County, W. Va.; Tazewell County reimbursed McDowell County for their per pupil cost.

Under a freedom of choice plan in 1965 and 1966, black residents of the town of West Point attended school in King and Queen County.

Henrico and Chesterfield Counties have been transporting school children to and from school by bus for many years.

HENRICO

In 1957, the school board of Henrico adopted transportation policies which included the requirement that bus routes shall be established in such manner as to require approximately 1¼ hours' running time. The white bus routes, formulated with the assistance of the State department of education in 1957, included recommendations that buses travel routes ranging from 11 to 20 miles, in certain instances.

In 1962 a committee from the Westwood Civic Association appeared before the board to request a change in the Westwood boundary line to permit their children to attend schools other than those into which they had been zoned. One reason presented in support of the application was that Westwood children "have attended twelve different schools in 15 years." The board denied the request.

Until 1969, black high school students in Henrico County had the choice of attending the Virginia Randolph High School in the northern section of Henrico, or the nearest formerly all-white school. Black children would go to the Virginia Randolph site from the Varina area by bus. The evidence fails to disclose the length of time the trip took.

In 1969–70, the county of Henrico transported daily an average of 22,484 pupils, of whom 9,694 were secondary pupils and 12,790 were elementary pupils. A total of 199 buses were used. Of these, 180 were in daily operation. They transported pupils a total of 1,139,006 miles. On an average, each bus carried 113 pupils. The total cost of Henrico's busing operation that year was $638,745.18.

Of 456 bus trips scheduled in Henrico County in 1970–71, 436 take less than 30 minutes to complete. Twenty trips take between ½ hour and 1 hour. A single trip takes slightly over 1 hour.

Henrico has used a transportation system requiring students to transfer buses; in at least one instance students were required to wait until 4:15 p.m. for their transfer bus on their homebound ride.

CHESTERFIELD

The Chesterfield School Board minutes of January 1940 record that the chairman named a committee to investigate the possibility of extending a contractor's bus route "on Stockton Street to accommodate pupils in that congested area, thus making it unnecessary for the children to wait in the cold for the bus."

On November 22, 1939, the Chesterfield County School Board appointed a committee to investigate the advisability of transporting Negro high school students to D. Webster Davis High School. The committee reported in early 1940 that since the county furnished high school facilities at Hickory Hill for blacks, the board should refuse to provide transportation to the Davis High School. The board approved that recommendation.

In 1941, black patrons again requested that the county furnish bus transportation for black high school students going to Hickory Hill and D. Webster Davis High Schools. A committee was appointed to investigate. At the next meeting the request was renewed. The committee, composed of the superintendent, requested further time for study.

In October 1943, a delegation of black patrons appeared to request that their children be furnished transportation to the Beulah School. A committee was appointed to make arrangements.

On October 9, 1951, the board of supervisors were receiving complaints concerning overcrowding on school buses. Applicants stated that they had gotten no relief from the superintendent of schools and the school board.

On October 24, 1962, a group of Midlothian District parents protested to the superintendent the removal of their children from Southampton School to Bon Air School on the ground of inconvenience caused by the transportation distance.

In August of 1963, parents of 15 children on Beechwood Avenue protested their transfer to Matoaca High School for the new session. There was a discussion of the busing distances involved; the board determined to adhere to its plan of assignment. Some of the parents whose children were transferred to the Matoaca High School brought suit to enjoin the assignment. The individual parents asked the board to reconsider the transfer, stressing the number of railroad crossings, mileage to Matoaca High School, and their personal desire to have their children continue at Thomas Dale. The school board agreed to study the matter.

The Virginia Pupil Placement Board reassigned to Thomas Dale School 13 of the Beechwood residents. The school board decided to give the seven remaining a freedom of choice, subject to the decision of the pupil placement board.

In the opinion of the Chesterfield School superintendent, there are no harmful educational effects attributable to the bus ride experienced by pupils in the Grange Hall area who are transported to Midlothian High School in order to take advantage of programs not available at the Grange Hall School, and the Court so finds.

The transportation practice in Chesterfield County has included transfer buses which wait at pickup points for students to arrive on other buses.

The Carver School is about 2 miles from the Curtis School. Carver was a black school through June of 1970, attended by students from all over Chesterfield County. The longest bus route to it took about 1 hour and 45 minutes to cover.

The Chesterfield superintendent of school was not aware of the maximum time that Chesterfield pupils might spend on a bus going to and from school each day. As an educator he felt confident in relying upon the transportation division people on his staff. He did not believe that a transportation time of 1 hour would be inordinate.

In 1970–71, 85 percent of Chesterfield County pupils transported by the school board traveled less than 30 minutes. Of the 376 trips, 47 were between 31 and 45 minutes, and 8 were between 46 and 60 minutes. Three trips were 61 minutes or more. One bus trip takes about 2 hours, however. This accommodates students going to Manchester and Midlothian High Schools from the Gange Hall area.

In 1969–70, Chesterfield County transported daily an average of 24,715 pupils, of whom 8,088 were secondary pupils and 16,627 were elementary students. There were 228 buses operated; of these, 180 were in daily operation. They carried students a total of 1,516,085 miles. The total cost of Chesterfield's busing program that year was $804,962.79.

There is no evidence before this Court that would give rise to any conclusion other than that the time and distance contemplated by the proposed plan would not be so great as to either risk the health of the children or significantly impinge on the educational process, and the Court so finds.

The Court finds that the transportation contemplated will in no event be for a longer distance or time than the maximum now utilized by the respective county defendants.

In reference to the transportation needs called for, the consolidation of the Richmond, Henrico, and Chesterfield school systems under the plan proposed by the Richmond School Board will not require additional buses.

From 1941 to the present, Chesterfield County has sent substantial numbers of pupils to school in the adjoining cities of Petersburg and Richmond. In 1949, 1950 and 1951, about 100 black students attended school outside the county. In other years, all students transferring were either white or of race unknown to the Court, save for 80 blacks taking vocational training in 1971. At one time, several hundred white Chesterfield students went beyond their county for an education. Since 1964, however, no more than about 50 per year, on an average, do so. Reasons for the transfer of these fairly substantial numbers of Chesterfield children to adjoining school divisions were proximity and access to special education facilities, from 1949 through 1964.

In late 1942, the superintendent requested and secured from the board of supervisors a supplemental appropriation to pay for the instruction of Negro high school pupils in the D. Webster Davis High School outside the county system and elementary pupils in the Matoaca Laboratory School.

On November 10, 1942, the Chesterfield County Board of Supervisors acceded to the school board's request and appropriated a supplement of $4,650 for the instruction of high school pupils at D. Webster Davis High School and elementary pupils at Matoaka Laboratory School for that session. Further requests, on October 9, 1945, for appropriations to pay for instruction at Webster Davis and Matoaka Laboratory School were denied by the board of supervisors, for the stated reason that the year's budget had been completed.

For the 1945–46 session, at the request of two officials of Virginia State College, the Chesterfield School Board directed that $3,000 be added to the budget for instruction of students attending the Webster Davis High School.

On October 25, 1948, the Colonial Heights School Board requested the Chesterfield County School Board to enter into a contract to furnish school facilities for city children during 1948–49. The county school board agreed to do so. Under the terms of the contract, the county school board of Chesterfield County agreed to operate and maintain the public school facilities in the city of Colonial Heights upon the condition that the city school board reimburse the county for all expenses, including those of sending city high school pupils to the Petersburg High School and to Thomas Dale High School in Chester, Va.

In 1949, two Negro high school students who registered in Petersburg schools requested the board to pay their tuition "on the same basis as white pupils." Board minutes relate the following action: "Since the county has provided an excellent Negro high school with modern facilities and transportation is available to the school . . . the request for tuition was denied." The Chesterfield School Board resolved that beginning in the fall of 1949, all Chesterfield residents would be required to attend county schools, and no tuition would be paid to other school divisions for the education of Chesterfield residents.

In January of 1949, a delegation requested that Ettrick and Matoaca High School pupils be permitted to continue to attend the high schools in Petersburg. The board refused to so allow. However, on request at the same meeting, the board resolved to allow elementary pupils in the Virginia State College community to continue to attend the Matocaca Laboratory School on the basis that the school board would reimburse the college in an amount equal to the average daily attendance of such pupils.

In February of 1949, the board directed its superintendent to submit a bill for $28,450.98 for the costs of educating Colonial Heights pupils through December 31, 1948, for payment by the Colonial Heights School Board.

On March 8, 1949, the board of supervisors, after conference with the Chesterfield County School Board, resolved to request the school board to continue to pay tuition for high school students in Matoaca area desiring to go to school in Petersburg, for a period of 3 years.

On June 22, 1949, the Chesterfield Board of Supervisors entered into a contract with the city of Colonial Heights to use an elementary school building in the city, commencing July 1, 1949, and until litigation between the city and the county terminated.

In June of 1953, the Chesterfield School Board resolved to cooperate fully in establishing a school for mentally retarded children in Richmond, Henrico, and Chesterfield, in cooperation with school authorities of the neighboring jurisdictions. Soon thereafter the board authorized its superintendent to make a survey of Negro mentally retarded children in the county, with an eye to using space then available at the Hickory Hill School. The school board resolved to educate mentally retarded Negro children at the Kingsland School.

In February of 1954, Lucian Adams, currently superintendent of schools of Richmond, appeared before the Chesterfield County Board of Supervisors to discuss the possibility of the city's acquiring a site in the county on which to build a white high school. Adams then stated that no good site was available within the city.

On March 13, 1957, the school boards of Colonial Heights and Chesterfield met jointly to elect a division superintendent of schools.

In 1957–58, the city of Richmond provided special education facilities for Chesterfield County pupils. The city continued this service in 1958–59, although it was unable to accommodate additional applicants.

The city of Richmond public schools advised Chesterfield school authorities in December of 1959 that special education facilities theretofore provided would not be available in the 1960–61 session. The school board directed its superintendent to confer with the Richmond superintendent in an effort to "continue the services we now enjoy, on a tuition basis."

In 1961, 160 white and 63 Negro pupils from Chesterfield attended Petersburg high schools by tuition.

In 1961, the Chesterfield School Board unanimously requested the State board of education to constitute the county of Chesterfield a separate school division, and requested the concurrence of the board of supervisors.

In March 1962, the Chesterfield School Board made arrangements with Dr. Thomas Little of the Richmond city schools for the transportation of Chesterfield pupils to the cooperative training center.

In 1963, the school board accepted nonresident pupils for enrollment on a tuition basis, subject to final decision of the pupil placement board.

In late 1963, the school board approved admission of out-of-division students to certain Chesterfield schools, subject to their placement in such schools by the State pupil placement board.

Just after the opening of school in 1964, Mr. Fulghum, a school official, advised the board that he hoped soon to begin transportation of Chesterfield pupils to the cooperative training center in Richmond.

On August 10, 1966, the Chesterfield School Board authorized the superintendent to handle each case on applications for tuition students "on its own merit and bring any special cases to the board."

In the spring of 1968, the Chesterfield County School Board approved the policy of admitting seniors who had moved out of the county but wanted to finish their senior year at their Chesterfield school on a tuition basis.

For the school year 1968–69, Chesterfield permitted three Powhatan County students to attend its schools in exchange for three Chesterfield residents possibly being admitted to Powhatan schools.

As part of the resolution of the annexation suit between Richmond and Chesterfield, which concluded during the summer of 1969, the Chesterfield and the Richmond School Boards agreed on terms on which educational services would be provided during the transition. Chesterfield would provide classroom space and instruction on a tuition basis for the residents of the annexed area for whom the city could not provide in the 1969–70 and 1970–71 school years. Chesterfield, in addition, would teach junior and senior high students in the annexed area, whom the city could not accommodate for 1971–72.

In the fall of 1970, the Chesterfield superintendent of schools explained to the board his actions in response to the requests of Chesterfield residents to transfer their children to county schools from those in the newly annexed area. The board agreed completely with his actions and directed that further requests for transfers would thenceforth be on a space-available basis.

Currently, Chesterfield County sends some pupils to a training center in Petersburg for the educable mentally retarded.

According to a survey taken of Chesterfield County schoolchildren recently, 1,299 white students and 36 black students attended Richmond City public schools in the year previous to their enrollment in Chesterfield schools.

In 1949, the superintendent advised the board that attorneys on behalf of Negro patrons in the Harrowgate Road area had requested equal facilities for Negro and white children. The superintendent stated that he had answered the petition, stating that full transportation facilities were then being offered. The board resolved to approve the superintendent's action.

On February 25, 1961, the board of supervisors appropriated about $285 per month to the health department in order to employ a "colored dentist, who would work in the colored schools of the county."

As of September 30, 1963, the superintendent reported enrollment to the school, classifying the pupils by race.

On February 12, 1946, the Chesterfield Board of Supervisors received complaints concerning the condition of a trash dump near the Hickory Hill School. Rats from the dump, allegedly, had become a menace in the neighborhood. The board urged a committee, earlier appointed, to find a suitable alternative location. When the principal of the Hickory Hill School complained of the rats, the board resolved to post "No Dumping" signs and appropriated $500 for extermination purposes.

On October 12, 1948, the board of supervisors resolved to resume use of the dumping area near the Hickory Hill High School.

In early 1949, the superintendent advised the board that property to the south of the Hickory Hill School might be rezoned for business purposes. The board took no action, not objecting to such a change.

On January 8, 1952, a citizen complained to the Chesterfield Board of Supervisors about the health hazards, due to mosquito breeding in the general area of Hickory Hill High School. The board referred this matter to the health department.

On August 26, 1955, the United Civic Association of Chesterfield County, by counsel, before the board of supervisors, to complain of the condition of the landfill operated in front of the Hickory Hill School. Their attorney complained of rat infestation and stagnant water. On September 23, 1965, another delegation complained to the board of supervisors concerning the Hickory Hill landfill. The board requested the city of Richmond to reduce the elevation of the landfill.

On November 12, 1946, the colored farm agent and the colored home demonstration agent appeared before the board and requested office space. The board referred the matter to the buildings and grounds committee for "action as early as possible."

On February 12, 1948, the colored farm agent appeared before the board of supervisors to repeat his request for office space for himself and the colored home demonstration agent. The board referred the matter to the buildings and grounds committee.

In October of 1948 the board of supervisors gave the colored farm agent and the home demonstration agent permission to use the lower end of the Red Cross building on the county fairgrounds.

Between 1946 and the securing of office space in October 1948, the colored agents made several requests for same, and on at least one occasion the colored country farm agent requested that, since the county had not provided him with office space, it at least meet the bill for the telephone which he had had installed in his home. The board of supervisors refused.

On June 22, 1949, the board of supervisors, on request, authorized the executive secretary to purchase two desk lamps and one fan for the office of the colored farm agent and the colored home demonstration agent.

On June 11, 1957, the Chesterfield Board of Supervisors voted to employ M. J. Edwards as the colored agricultural agent for the county.

Writing in midcentury, an historian of the region remarked, "So, counting only from 1607, Chesterfield looked back with certainty to almost three and one-half centuries of white occupancy."

On January 31, 1940, a delegation of Negro citizens addressed the Chesterfield County School Board, requesting the establishment of a regular pay scale for black teachers based on training and experience, and an increase in black teachers' salaries up to a certain minimum level. The salary of the Negro supervisor for 1940–41 was $1,200.

In 1940, the Chesterfield School Board rejected the requests of the principals of Union Grove School and Kingsland School for raises in salary on the ground that they had not been anticipated in the current budget.

In 1940, again a delegation of black citizens petitioned the Chesterfield School Board to act immediately to equalize black teachers' salaries with those of whites. The board accepted the petition and filed it for future consideration.

At the school board meeting of March 26, 1941, a delegation of black citizens again appeared before the Chesterfield Board and urged that their request presented in December 1940, be answered. The board resolved that it would be its policy to adopt a single salary schedule beginning with the 1942–43 session.

In October 1947, a delegation of patrons of the Union Grove Negro school complained to the board that their children were not receiving adequate preparation for high school and that the school was being run in an inefficient and undisciplined manner. The board directed the superintendent to investigate.

In early 1949, the Chesterfield School Board adopted what appeared to be uniform salary scales for classroom teachers.

In 1952, the board authorized the county's single Negro music teacher to be reimbursed $10 per month for travel. The board, however, declined to pay half of the purchase price of a piano for Carver High School.

The opening day calendars for 1962–63, and 1963–64, scheduled segregated meetings of principals and teachers.

When the Dupuy School was closed after the 1969–70 school year, its principal, who was black, was transferred to a position as associate principal at the Ettrick building. Subsequently, the principal at Ettrick retired, and currently the former Dupuy principal is principal at Ettrick.

In October of 1970, the Department of Health, Education, and Welfare, Office of Civil Rights, expressed its concern to Superintendent Kelly over the system's performance of recruitment of black professional staff.

When the Union Branch all-black elementary school was closed at the end of the 1969–70 session, its black principal was made associate director of title 1 project for the county.

When the Carver School was closed, its principal, who was black, was transferred to the central administration office and made a planning principal.

DESEGREGATION EFFORTS AFTER BROWN

In 1954, the following notation appears in the Chesterfield School Board minutes:

> A motion made by Mr. Wells asking that members of this board, as individuals, seek the advice of our legislators on the recent Supreme Court decision, died for lack of a second.

In mid-1955, the Chesterfield School Board incorporated superintendent's memorandum No. 3164 of June 28, 1955, in the minutes of its meeting. This is the memorandum wherein the State board of education adopted as "the policy of this Commonwealth" that Virginia public schools would operate in the coming school session as before.

The Chesterfield County School Board resolved that it favored the convening of a constitutional convention to amend section 141 of the State's organic law in accordance with the proposal of the Commission on Public Education appointed by the then Governor. The resolution stated:

> The school board specifically favors the proposals providing for a high degree of local authority in the schools with particular regard to the assignment of pupils and teachers and also to the proposal making possible tuition grants to those parents who are unwilling to have their children attend integrated schools.

On December 13, 1955, the Chesterfield Board of Supervisors approved that section 141 of the constitution of the State of Virginia be amended as recommended by the Gray Commission and endorsed the calling of a constitutional convention.

On August 14, 1956, the executive secretary of Chesterfield County read into the minutes of a board of supervisors meeting a letter from the Governor and a State senator, "Thanking the board for its approval of the proposed action on the school problem." The board, at its July 24 meeting, had passed a resolution commending the Governor for having recommended to the general assembly a proposal to continue segregation in the State's public schools.

On January 29, 1959, the Chesterfield Board of Supervisors passed a resolution urging the members of the General Assembly of Virginia, which was then in special session, to enact such laws as "will hold the line against integration of the races in the public schools of this Commonwealth."

The board of supervisors expressed its previous stand against what they considered to be usurpation of the State's sovereignty by the Supreme Court of the United States, and pledged to the Governor and to the attorney general of Virginia their continuing support in "this fight to preserve constitutional government." They also stated,

> . . . if it is necessary in order to preserve segregation in the public schools of this Commonwealth, that all public schools in this State be declared in vacation, or placed under the supervision and control of the general assembly until a plan can be devised to prevent integration of the races in our public schools.

The Court finds that the officials of the city of Richmond, counties of Chesterfield and Henrico, as well as the State of Virginia, have by their actions directly contributed to the continuing existence of the dual school system which now exists in the metropolitan area of Richmond.

On December 29, 1956, the Pupil Placement Board of the Commonwealth of Virginia transmitted the following telegram to the Chesterfield-Colonial Heights superintendent of schools:

> Under the provisions of chapter 70, "Acts of Assembly," extra session of 1956, effective December 29, 1956, the power of enrollment or placement of pupils in all public schools of Virginia is vested in the pupil placement board. The local school boards and division superintendents are divested of all such powers. Within a reasonable time you will be furnished a supply of application forms, placement forms, and such other forms and instructions as may be necessary for the proper administration of the act. In the interim, and pending official placement by the pupil placement board, under the terms of said statute and such regulations as may be promulgated, the pupils who may be entitled to be placed in a school under section 4 of said act may, in the discretion of the school board and division superintendent, and in conformity with your practices, be permitted to attend school on a temporary basis, subject to placement by this board. You will please make proper distribution and publication of this notice.

This telegram was placed in the school board minutes. Superintendent's memorandum No. 3360 of January 11, 1957, follows immediately in the minutes. Therein the superintendent of public instruction states that upon the request of the pupil placement board he is advising local school boards of the procedures to be followed in assigning pupils. The school board resolved that it desired to assist the pupil placement board in its tasks.

On June 28, 1962, the pupil placement board wrote Dr. James H. Brewer, of Ettrick, Va., to advise him that they declined his request to place his son in Ettrick Elementary School and had placed him in the Matoaca Laboratory School instead. Factors considered included the homogeneity of the neighborhood, and the Matoaca Laboratory faculty and facilities. The pupil placement board also noted that schoolbus transportation was provided to the Laboratory School, but not to Ettrick. An ore tenus hearing to review this decision was required to be advertised in a Richmond newspaper once a week for 2 consecutive weeks. Obviously the purpose of such a requirement was to inhibit blacks from seeking transfers to white schools.

The present superintendent of Chesterfield schools agreed that the school environment plays a role in developing children's attitudes. At the elementary level he hoped that children would gain a sense of the geography of their own community while in or near their school. He stated that perhaps some areas in Chesterfield were homogeneous as to race. He thought racial homegeneity was not a proper basis upon which to develop assignment patterns; and the Court concurs. That factor, however, was used in Chesterfield County in connection with the pupil placement board.

In early 1965, the Chesterfield School Board directed its division superintendent to submit to the Department of Health, Education, and Welfare a copy of the order of this Court in *McLeod* v. *County School Board of Chesterfield County*, of November 15, 1962, and inform that Department that the School Board of Chesterfield County was in compliance with that order.

In March of 1966 the Department of Health, Education, and Welfare transmitted desegregation guidelines to the Chesterfield School Board.

On April 7, 1966, the school board discussed a desegregation plan required by title VI of the 1964 Civil Rights Act and adopted a freedom-of-choice proposal.

In late 1966 the school board determined to defer consideration of operating a Headstart program in the county because HEW guidelines restricted the operational authority of the school board.

During the school year 1967–68, under a freedom-of-choice plan, 710 Negro children were anticipated to attend formerly white schools.

In the spring of 1968 new school desegregation guidelines were received by the superintendent, and he shared this information with the school board.

The Chesterfield School Board was informed in March 1968 of the results of the freedom-of-choice plan for the 1968–69 school year.

Dr. Eloise Severinson, of the Department of Health, Education, and Welfare, wrote Superintendent Alcorn on July 16, 1968, concerning possible termination of Federal aid. Dr. Alcorn advised the board of this possibility and discussed desegregation plans for the coming year. Approximately $900,000 in Federal funds were at stake.

On August 20, 1968, a special meeting was held concerning desegregation matters. The board met in executive session with its counsel. After public discussion the board decided to propose to HEW a plan of total desegregation by September 1970.

In August of 1968 the Chesterfield School Board approved a new desegregation plan for submission to HEW. The board proposed to close Bermuda, Hickory Hill, Kingsland, Midlothian, and Winterpock Elementary Schools prior to the 1969–70 session, and to close Carver High School, Dupuy Elementary, and Union Branch Elementary the succeeding year. After the closing of these black schools all pupils would be assigned by geographic zones. The Department of Health, Education, and Welfare approved the plan as submitted.

On April 23, 1969, the Chesterfield Board of Supervisors requested the school board and the superintendent to reconsider the school plan that they submitted to the Department of Health, Education, and Welfare for the reasons that the plan would necessitate some overcrowding, the use of temporary facilities, and that the annexation case then pending might require further redistribution of students.

After the opening of schools for the 1969–70 session, when Richmond city schools were operating under an interim desegregation plan ordered by this Court, and at a time when, under agreement ancillary to the recent annexation of additional territory, a number of Chesterfield County residents were to be educated under agreement in the Richmond city schools, the Chesterfield superintendent of schools publicly offered any such Chesterfield resident a place in the county school system. Dr. Kelly recommended this action to the chairman of the school board, and thereafter extended an invitation to any Chesterfield County student to come to Chesterfield schools, not restricting his announcement to those who had specifically so requested.

In 1970–71, Dr. Kelly stated, and the Court so finds, that some Richmond residents attempted to enroll in Chesterfield County schools This was the first year for substantial desegregation at some levels in the city schools.

In 1969–70 there were nine Chesterfield County schools without any blacks on their faculty.

Richmond residents have rented apartments in Chesterfield County and used such addresses in an effort to enroll in Chesterfield schools.

In 1969, under a freedom-of-choice plan, Carver High School accepted students from all over the county. Black students were bused to Carver High School from all points of the county. In the school year 1968–69 there were nine schools with all-black student bodies in Chesterfield.

It seems obvious that desegregation by means of a freedom-of-choice plan was and will be impeded if various schools within the system are identified by such terms as "formerly all black," "formerly all white," or are allocated faculty members entirely or predominantly of one race.

In the years 1966–67 through 1969–70, the student body at the Carver Middle School and at the Carver High School was 100 percent black, and the faculty was over 90 percent black.

The Chesterfield County superintendent of schools testified that he would not know, as superintendent, the percentage of the number of black elementary teachers at each of his schools or the number of Negro students in various extracurricular activities.

In 1970–71 there were 13,586 elementary students in Chesterfield County schools, of whom 1,189, or 8.75 percent, were black. In 1966–67 there were 1,467 black pupils in Chesterfield County schools. The absolute number of black elementary students has been falling gradually at least since 1966–67. In 1970–71, 44.5 percent of the students and 42.1 percent of the faculty at the combined Ettrick and Ettrick annex school were black. At the Matoaca Laboratory School, in the same year, 99 percent of the students and 100 percent of the faculty were black. Substantially the same racial proportions prevailed in this school over the preceding four sessions.

The popular reaction in Chesterfield to the phasing out of all-black schools has been highly tolerant.

Racial enrollments for the Chesterfield County public schools in 1969 and 1970 showed that out of 27 facilities, 14 have either the same black enrollment or a smaller one in 1970–71 than during the previous session.

Chesterfield County defendants argue that, under the definition of Dr. Pettigrew, all the schools of Chesterfield County are racially nonidentifiable. This is not the case, for one of the criteria of integration applied by Dr. Pettigrew, hereinafter referred to, is the requirement that black students, though they might be in a minority, participate fully in the life of the school. Chesterfield's own exhibit CX–32 illustrates that as the proportion of black students rises from about 3 percent to well over 10 percent, in a particular high school, the number of extracurricular organizations in which blacks play a part rises dramatically. The court has in mind the comparison between Thomas Dale High School and Meadowbrook High School. In Thomas Dale there are 191 blacks and 1,506 whites; this school has 26 active extracurricular clubs—21 have participants of the black race. By comparison, in Meadowbrook High School, where 33 blacks attend school with 1,102 whites, 27 such clubs are active—blacks take part in only six of them. Of nine active sports, blacks participate in seven at Thomas Dale and only three at Meadowbrook.

The Matoaca Laboratory School historically had been operated on the grounds of Virginia State College with financial aid from the State flowing through the Chesterfield County School Board. The county school board, in addition, has provided some teaching materials, bus transportation for pupils, and some food service.

Chesterfield defendants assert that the sole connection between Chesterfield County and the Matoaca Laboratory School, which has historically been and is to this date all black or nearly so, has been that Chesterfield provided transportation for its students and passed on to the Virginia State College, State funds to be used in operating the school. In fact, Chesterfield school officials have always relied upon the laboratory school to absorb some of the black residents in the Ettrick area of Chesterfield County. When it appeared that the capacity of the Matoaca Laboratory School was inadequate for this purpose, new black schools were built instead of assigning the overflow to existing white facilities or expanding them.

When the Dupuy Elementary School was under construction, the superintendent of Chesterfield County schools wrote to parents concerning transfers from the Matoaca Laboratory School and the Union Grove School to the new facility. He wrote:

> As you well know, the Matocaca Laboratory School has been overcrowded for a number of years, and those of you who are long-time residents will recall that a number of years ago we transferred all seventh grade children to the Union Grove School, and on other occasions requested some of the children who lived not far from the college to attend the Union Grove School in the lower grades.

He went on to relate that, after conference with Virginia State College officials, new enrollment quotas for Matoaca Laboratory had been fixed. This correspondence demonstrates the close working relationship existing between Chesterfield and Virginia State in the operation of the laboratory school.

Recently, Dr. Severinson of HEW advised Dr. Kelly that the continuation of Chesterfield's connection with the Matoaca Laboratory School might conflict with HEW compliance requirements. Therefore, during the hearings in this case, the Chesterfield County School Board attempted to disassociate itself from the school's operation by severing all connection. In fact, it appeared from Dr. Kelly's testimony, Chesterfield will continue to afford some services to this facility, if permitted. In any event, the most that can be said for the defendants' position as to this school is that Chesterfield County and the State of Virginia have operated an all-black school for many years, with varying degrees of participation by each.

HENRICO

Four years after *Brown*, the Henrico School Board was still scheduling separate meetings for Negro and white principals.

To open its school session of 1961–62, there were scheduled separate orientation meetings, X-rays, and meetings of incumbent teachers for whites and Negroes.

For the 1964–65 session the board reappointed principals for all its schools, classifying the Negro school separately.

In September of 1964, the Henrico coordinator of special education submitted a report on special education to Superintendent Moody. Therein he noted that, "inasmuch as there are more Negro people getting certified in the area of special education, it may be necessary to consider employing a few."

The session calendar for 1968–69 of the Henrico public schools, in providing for a superintendent's meeting with principals and staff, does not provide for racially segregated meetings.

Henrico has in the past differentiated in the pay scale for white and Negro teachers.

Subsequent to a 1942 annexation which gained for Richmond a portion of Henrico County, the city temporarily took into its schools about 300 Henrico children. The county leased to the city two spare schoolbuses for that year's transportation needs at the Westhampton School.

In 1953, Henrico voted to join with Richmond and Chesterfield in the operation of a joint school for the mentally retarded.

From 1944 through 1947, about 90 Henrico students, all white, attended Richmond public schools, pursuant to an agreement ancillary to an annexation. Beginning in 1959, Henrico students regularly began to attend Richmond schools for special education classes. In 1960, Henrico began to send pupils to Richmond and other jurisdictions pursuant to the State tuition grant program. The implementation of this State tuition grant program entailed large expenditures both from the county and from the State.

John F. Kennedy School, operated by the school board of the city of Richmond, is located in Henrico County. Fairfield Court Elementary School, also operated by Richmond, is located partly in Henrico. Both have historically had predominantly black enrollments.

In 1957, the Henrico School Board requested its superintendent to confer with Richmond school officials on the possibility of some Negro pupils in eastern Henrico attending high school in the city.

In 1961, the board discussed in executive session the possible effect of a merger of the county of Henrico and the city of Richmond on the Henrico County school system.

In 1962, the board directed the superintendent of schools to handle applications for admission by nonresident pupils on an individual discretionary basis.

In its submission to the Department of Health, Education, and Welfare in August of 1965, Henrico County explained its policy with respect to the admission of nonresident students. One justification for admission of such pupils in the past, the plan stated, occurred when a child lived just over the county line and much closer to a Henrico school than to his own. Dr. Campbell testified that this, under current policies, would not be considered sufficient "hardship" to justify admission, and the Court so finds.

During 1970, the superintendent informed the school board that nonresidents were making increased efforts to enroll their children in the county schools, and the Court so finds. He told them also that in his opinion, under the Civil Rights Act of 1964, Henrico could be "required to justify" enrollment of nonresidents. In response, the board agreed to "continue our traditional policy of enrolling nonresident pupils on a very limited basis where there is a justified cause established. Otherwise, nonresident pupils cannot be admitted even on a tuition basis." The administration was advised to inform principals that "extreme care must be used in enrolling nonresident pupils."

In the school year 1970–71, there were 34,331 pupils in the Henrico system. Of these students, 2,035 had transferred, immediately upon leaving the Richmond system over the past 10 years, to the Henrico system.

In February of 1956, the school board directed its superintendent to advise the Congressman from its district that the Henrico School Board opposed further Federal aid to education.

On October 18, 1956, the Henrico County School Board accepted a voluntary contribution by pupils of the county's Negro schools to the Virginia Randolph Foundation.

Virginia Randolph High School, prior to its closing at the end of the 1968–69 school year, had an attendance zone covering the entire county of Henrico.

The Henrico Board of Supervisors did not leave educational matters to the school board. On April 12, 1961, they passed the following resolution:

> Whereas, it is recognized that the education of our children is a basic necessity in order to preserve an intelligent and progressive democracy, and
>
> Whereas, the services, facilities and methods most effectual to this end differ from place to place, and are best known by the localities themselves, and
>
> Whereas, in recognition of this fact, education has been, from the earliest history of our country, the responsibility of the individual States, and
>
> Whereas, Federal encroachment in many areas is being viewed with increasing distaste, and
>
> Whereas, Federal aid in any undertaking implies a degree of Federal control: Now, therefore, be it
>
> *Resolved*, That this board expresses its opposition to the establishment of any further Federal aid to schools or Federal intervention in the educational affairs of the several States, be it further
>
> *Resolved*, that the Clerk be instructed to send copies of this resolution to the Honorable Harry F. Byrd and the Honorable Willis A. Robertson, U.S. Senators from Virginia, and the Honorable J. Vaughan Gary, Representative in Congress from the Third Congressional District of Virginia.

In 1965, the Henrico School Board authorized or directed its chairman to sign on behalf of the school board an assurance of compliance with HEW regulations implementing title VI of the 1964 Civil Rights Act. Copies of the assurance document were forwarded to the superintendent of public instruction of the State of Virginia.

In May of 1965, the Henrico School Board prepared a general statement of policies under title VI for the U.S. Office of Education.

The Henrico School Board proposed to comply with the 1964 Civil Rights Act by means of a plan which gave each pupil the right to apply for a transfer by parental request to a school other than that to which they would normally be assigned. Choice was restricted to either the nearest formerly all-Negro school or the nearest formerly all-white school.

On October 10, 1965, the superintendent of schools submitted a modified plan to the U.S. Office of Education. "The choices made by the white population made it impossible to operate the school system under the previous plan," he said. He therefore requested approval of a plan based upon zones and freedom of choice, which gave each parent the option to enroll his child either in the school within the zone of residence or in the nearest formerly all-Negro school.

The assistant superintendent of schools presented to the board a proposal for the summer of 1966 for four "target area" schools to receive Federal financing under the Elementary and Secondary Education Act. The project would serve pupils in grades 1 through 3 in

Fair Oaks, Central Gardens, Henrico Central, and Virginia Randolph Elementary Schools. The board voted to authorize transmission of the application to the State board of education for approval.

In 1966 the board authorized its superintendent to "take all steps to secure HEW approval to continue the present plan of desegregation as revised to include some faculty desegregation."

At a special meeting on May 6, 1966, at which the chairman and two members of the county board of supervisors and the county manager were present, the school board discussed a meeting at the U.S. Office of Education the previous day, at which the superintendent of schools, the chairman of the school board, the chairman of the county board of supervisors, and the county manager were present. The school board "reaffirmed its position desiring to operate on the basis of the plan of desegregation" as previously adopted.

On May 10, 1966, at a special meeting of the school board, the board reaffirmed its position as to the desegregation plan theretofore adopted, authorized the superintendent to file that plan with the Office of Education, together with form 441-B, with the notation that the board believed the plan in compliance with the HEW guidelines, and declared its opposition to participation and further conferences with the U.S. Office of Education except those necessary to pursue administrative remedies. The board further instructed the superintendent to proceed with the plan it adopted for the coming year.

Prior to the opening of school for the 1967–68 session, the Henrico School Board met in executive session, following which it is recorded in the minutes that it was the recommendation of the superintendent of schools that the Henrico public schools continue to operate under the current desegregation plan for the forthcoming year. The board authorized the superintendent to file form 441-B, without special covenants, with the U.S. Office of Education.

On February 16, 1968, the Henrico Board of Supervisors unanimously passed a resolution rejecting charges by the Department of Health, Education, and Welfare that sufficient progress toward school desegregation had not been made, "and more specifically, that officials are maintaining small inadequate schools, and that the educational program of Virginia Randolph High School, in particular, is 'demonstratively inferior' to other schools in the system." The board of supervisors stated its support for the "democratic principle of complete freedom of choice for every child," and noted that "over 42 percent nonwhite students are presently attending integrated facilities; 27 of the county's 41 schools are now desegregated." They were, in fact and law, operating a dual system.

On October 24, 1968, the school board was advised by counsel that in the light of Federal court decisions the school board "has no choice except to close the four Negro schools and eliminate a dual school system," according to the minutes of the board. Thereafter the board resolved that beginning September 1969, the Fair Oaks, Henrico Central, Virginia Randolph Elementary School, and Virginia Randolph High School should be closed and students now attending those schools should be reassigned according to geographic zones. The board resolved also to assign teachers and staff personnel from such schools on an objective, nonracial basis, beginning in September 1969. The board made its resolution contingent upon the dismissal by the Department of Health, Education, and Welfare of pending enforcement proceedings.

On January 2, 1969, Mrs. Ruby G. Martin, the Director of the Office for Civil Rights of the Department of Health, Education, and Welfare, wrote to Superintendent Moody that the desegregation proposal theretofore submitted, which included the closing of the four all black schools and the reassignment of their staffs, would be acceptable. She added that she understood that the system would be operated on a nondiscriminatory basis in all other aspects and directed the superintendent's attention to HEW regulations covering nondiscrimination in the reduction of professional staff. Mrs. Martin stated that the State department of public instruction would be advised of Henrico's eligibility for Federal financial assistance.

At the beginning of the 1969–70 school year, five black schools were closed by the county of Henrico as part of its compliance effort. The former principal at the Fair Oaks black school was made an assistant principal at Brookland School. Henrico Central Elementary School's former black principal was made an assistant principal at Varina Elementary School. The Virginia Randolph Elementary principal was made a visiting teacher. Virginia Randolph High School's black principal was moved to the position as assistant principal at Hermitage High School.

On the request of the division of recreation, the school board authorized continuation, during the summer of 1969, of the recreation program at Fair Oaks, Henrico Central, Virginia Randolph High School, and Virginia Randolph Elementary School.

The defendants suggest that the so-called terminal desegregation plan adopted by Henrico County School Board for 1969–70 entailed the "temporary closing of certain schools which had remained all Negro schools under the interim desegregation plan." In fact, the proposal made to HEW does not indicate that the shutdown of all black schools was a temporary measure, and HEW officials expressed reservations about effecting desegregation by closing all black schools. In fact, some of the schools were reopened after a year of idleness. The Virginia Randolph facility, however, became a special program center. Others are now operated as annexes to formerly all white schools, after a change in name.

On November 28, 1969, Dr. Campbell, superintendent of Henrico County schools, was notified by the regional civil rights director for the Department of Health, Education, and Welfare, of her concern that the Central Gardens Elementary School appeared to be becoming an all black facility on account of the racial composition of its attendance zone. She asked to be informed of steps to avoid resegregation. On December 10, she reiterated her concern with the composition at Central Gardens. Additionally, she urged the school division to recruit black staff members to increase the minority component, then at about 4 percent.

In 1970–71, Central Garden School had a 95.7-percent black student body and a 40.7-percent black faculty. In 1969–70, that school had a 94.6-percent black student body and a 44-percent black faculty. In 1968–69, Central Garden had a 90.73-percent black student body and a 47.82-percent black faculty. In 1967–68, the Central Gardens student body was 77.7-percent black; and its faculty was 46.4-percent black. In 1966–67, Central Garden's student body was 62.6-percent black. Its faculty was then 17.4-percent black. Thus, it is clear that, either by design or by permissive inaction, the Henrico County School Board increased the proportion of black faculty members at this facility as the student body became increasingly black. The administration, in other words, whatever the cause of the change in student body proportions, made a separate contribution to the racial identifiability of this facility.

On May 26, 1971, Superintendent Campbell advised Dr. Severinson of HEW that the Henrico School Board had approved a new zone system which accomplished the desegregation of the Central Garden's student body. The facility was combined with four other elementary schools. Some former Central Garden pupils now go to a school, Highland Springs, 8.3 miles distant from their former school. In the opinion of the Henrico County superintendent, however, the change constitutes no deviation from Henrico's "traditional" neighborhood school concept. All of the schools in the Central Gardens desegregation arrangement will be from 69- to 81-percent white.

Dr. Campbell said that he chose to desegregate Central Garden School by introducing students from four other elemenetary facilities partly in order to establish a core of a future middle school in the area. He said, however, that he would have used a similar desegregation technique in any case. To pair Central Garden with, say, Ratcliffe School would have given a result of 62-percent black student bodies in each school. In his opinion each school would still be racially identifiable. The plan eventually adopted, although it employs a greater degree of transportation than simple pairing, still does not incorporate what Dr. Campbell considers excessive or disruptive transportation. The court is in agreement with him on that point.

Dr. Campbell understood the nature of the continuing duty to eliminate racial identifiability of school facilities as it was expressed to him by HEW. Speaking as an educator, however, he testified that he would consider a school identifiable racially when the school board had officially tried to keep it that way.

On April 29, 1971, HEW requested information on Henrico's assignment of its faculty and staff so that the minority group proportion is substantially the systemwide ratio, to be submitted within 15 days after receipt of the correspondence. An attached memorandum brought to Campbell's attention that HEW would inquire when it appears that a district is assigning teachers or staff "to particular schools on the basis that tends to segregate." Campbell replied on May 13, 1971, to the effect that he was unable to submit the requested information because reassignment of teachers was in progress. He noted, however, that "a large part of meeting the ratio involves reassignment of the black teachers at Central Garden Elementary School. These teachers have already been reassigned for the next school session or have been informed that they will be reassigned."

By letter of July 30, 1971, Campbell advised HEW that redistribution of faculty personnel had been accomplished, so that during the school session 1971–72 each of the 43 school facilities will have at least one black.

Out of an administrative staff of 134, only three were black.

While Dr. Campbell stated that one of the indicia of racial identifiability would be faculty composition of a particular school, numerous Henrico schools in 1966–67 through 1970–71 were without any black faculty members. In 1970–71 at least 10 schools had all white faculties.

Reassignment of faculty in an effort to eliminate the racial identifiability of Henrico school facilities was not achieved until after the county officials had been made parties to this lawsuit. Subsequent to those reassignments, Henrico officials took their further steps to desegregate Central Garden School.

When asked why Henrico had not sought to establish parity in teacher assignments by race during the 1970–71 school year, Dr. Campbell replied that the directive from HEW had not come to them until January of 1971. Apparently, he had no other source of information on the desegregation requirements.

During the current school year, 25 schools in Henrico have only one black faculty or staff member. Even this figure, as to certain schools, may include a guidance counselor or a librarian. No effort has been made to insure that one black classroom teacher is in each school.

In the school year 1970–71, Henrico received $766,776 in Federal educational assistance funds.

The records of the Henrico school system and of the State board of education demonstrate that in several instances the attitude of Henrico officials was less than cooperative, in complying with HEW requirements.

The Court accepts plaintiffs' exhibit 116 as an accurate compilation of the Henrico County schools' student and faculty composition over the years.

PUBLIC RESISTANCE

Under Virginia State law, school divisions lack taxing authority. School boards are not directly responsible to the electorate.

In Henrico and Chesterfield Counties, bonds for new school construction may only be issued if an affirmative vote is cast in a referendum. No such vote is required in the city of Richmond.

As of July 1, 1970, the bonded debt of the Chesterfield County School Board was $37,794,869.25. An additional issue for $17,700,000 was approved in November of 1970; at the date of trial the bonds had not yet been sold. Since 1950 one bond issue was disapproved by Chesterfield County voters; this was in 1956.

As part of the most recent bond proposals submitted to referendum in Henrico County, an issue intended to support a kindergarten program failed of passage. The November 1970 bond issue in Chesterfield County passed by a scant 200 votes.

The Chesterfield superintendent voiced the opinion that if a metropolitan solution were found to the school desegregation problem in the area, the result would be a loss of Chesterfield's fine spirit of innovation and willingness to sacrifice for quality education. Such doom has been prophesied in desegregation litigation since the *Brown* argument, of course.

The Court finds that the causal relation between new facilities and improved attitudes and achievements has not to date been shown to be strong.

Dr. Britton of Henrico stated that if consolidation of school systems took place, bond issues for new school construction would not pass in Henrico. He based his opinion upon his own perception of public opinion in the county. Henrico citizens, he thought, were opposed to this lawsuit and would not be willing to pay for new schools if Henrico residents would be denied access to them in large numbers.

Mr. Burnett expressed fear that Chesterfield citizens would be reluctant to approve bond issues for construction of schools throughout the Richmond metropolitan area. His fear is that citizens would be unconvinced that the county got its fair share of the returns for such indebtedness. This need be no great obstacle, however, for Virginia law enables a consolidated division school board to arrive at an equitable arrangement for the sharing of costs of debt service, either on a pro-rata basis keyed to pupil population or on some other agreed upon formula. Va. Code § 22-100.9 (1969 Repl. Vol.). The Court is aware that in 1956 a Chesterfield school bond issue failed of passage, and that one member of the board of supervisors, prior to the referendum, voiced the fear that citizens might be reluctant to vote in favor of a program to construct integrated schools. The mandate of the Constitution will not, of course, cede to hostility to its dictates.

If there is such a "national taxpayers revolt" as some defense experts suggest, against the raising of revenues for the maintenance of public schools, it has not yet spread to the Richmond metropolitan area. Each of the two counties has a remarkable record of success in achieving passage of bond issues at referenda, and, and the State and county defendants admit, the city of Richmond, although not submitting such issues to referendum, taxes itself, by national standards, at a fairly high rate for the maintenance of public schools. Richmond's tax effort, in fact, is higher than that of Henrico. Moreover, as President Caruthers testified, school authorities face a continuing struggle, issues of integration aside, to persuade their constituents that additional revenues are necessary. It is difficult to see how any court could judge and weigh such financial perils of consolidation, separating voters' permissible motives from the impermissible.

It is clear from testimony by experts and local political figures that a substantial factor motivating the opposition to consolidation expressed by officials of both counties and reported to be shared by their constituents is resistance to desegregation. Objections addressed to the proposed administrative and financial do not appear substantial. In any event, if the consolidated school system under financial arrangements dictated by State law proves unworkable, it is within the power of present parties to this lawsuit to suggest an alternative mode of organization.

The Court, from its own experience in desegregation cases, notes that wherein strong leadership is offered on the part of school, county, and city officials in effectuating the law, desegregated school systems work to the benefit of all citizens.

President Caruthers stated, and the Court finds, that the State board of education was capable of assisting a consolidated school system, such as that sought in this case, to operate successfully, whatever the origin of such a system. While he feared a lack of popular support for such a consolidated system, he did state, based upon his experience both upon the State board of education and the Arlington County School Board, that school districts everywhere, whatever may be the issue of the day, faced dissatisfaction among their constituents.

When asked whether efforts of the State board to improve quality education should be restricted by existing school district boundaries, President Caruthers of the State board stated that he and his board had to recognize certain "practicalities." Nonetheless, he stated that if programs could be made more effective by crossing school divisional lines, arbitrary boundaries should not be permitted to stand in the way.

The community or neighborhood school as it exists today does not, by its proximity to pupils' homes, materially assist to accomplish educational goals. It is primarily a matter of convenience.

At least one witness, a school official of Chesterfield County, who although unsympathetic to the plaintiffs' position, and who was first called to the stand by the plaintiffs, testified responsively to the questions propounded. The evidence indicates that shortly thereafter, during the course of this trial, he was subjected to abuse concerning the nature of his testimony, which resulted in a meeting being called at which the attorneys for at least some of the county defendants apparently explained the witness' previous testimony.

The Court would be very much surprised if much of the public resistance to the desegregation of schools would not dissipate if the general public were cognitive of the full measure of discretionary practices to which members of the plaintiff class and their parents and grandparents have been subjected. It is regrettable that every fair-minded person who will be affected by this Court's action did not hear what was virtually uncontradicted evidence.

RICHMOND METROPOLITAN DATA

The Richmond metropolitan area here involved contains 480,840 persons, according to the 1970 census. The city of Richmond covers 63 square miles and has 249,621 people, Henrico County has 244 square miles and 154,364 persons, and Chesterfield County covers 445 square miles and has 76,855 persons. The three political subdivisions cover 752 square miles.

In 1967, the most recent year for which data is available, Richmond contributed 76 percent of the value added by manufacturing in the region. Chesterfield had 20 percent and Henrico, 4 percent. In retail sales, in 1970, Richmond did 62.5 percent of the area's business; Chesterfield, 5.4 percent; and Henrico, 32.3 percent.

Retail sales employment is generally lower paying than manufacturing or office employment. Generally, tobacco workers are paid less than workers in the textile and chemistry industries. The former jobs are in Richmond; the latter in the counties.

Richmond School Board Exhibit No. 55 shows that in the region, 12,868 people are employed in Chesterfield; 22,872 in Henrico, and 129,590 in Richmond. Mr. Burnett stated that his data showed that there were 30,000 jobs in Chesterfield. His information included employees who would not be covered by State of Virginia unemployment compensation. The city school board's exhibit concerned "covered" employment. Burnett conceded that all of the figures on exhibit No. 55 would be increased substantially if employment not "covered" were included as to each political subdivision, and the Court so finds.

The Public Administration Service Report of 1959 was financed by the three jurisdictions belonging to the Richmond Regional Planning Commission. The PAS Report stated that, "Joint meetings of any combination of the three governing bodies are rare, and there have been a number of instances of failure in efforts to work out mutually agreeable solutions of regional problems."

> Orderly development of the Richmond region and the capital area through effective government is dependent on maximum cooperation and coordination. (RSB 89, at 4–1.)

The PAS Report focused attention upon inefficiencies involved in managing the school systems of the three governmental units on a separate basis:

> With each school operation going its separate way, more optimum efficiency in management and best planning, location and utilization of the expense of school plans are difficult, if not impossible of achievement. Whatever may be the outcome of the current controversy over public education in Virginia, it does not seem likely that it will result in the scrapping of the $60 million school plan that now exists in the region, or in the discontinuance of its expansion and its need for unified management.

The region's economic community of interest was recognized by the Public Administration Service:

> Evidence of local belief in the need for further modification of the accepted pattern in the tri-jurisdictional area is found in the establishment of the Regional Planning Commission in 1957. Recognition was thereby given to the fact that many governmental problems need something other than rural treatment or urban treament; rather, they need a comprehensive plan patterned to fit the varying conditions that continue to plague the governing bodies and executive heads of the local governments.

The PAS Report noted that characteristics "common to the city and the counties are at least as striking as are their differences." The three areas were found similar in governmental functions, in the amount of State supervision and control and assistance. The local governing bodies were found more alike than different in their use of appointive executive forms of organization and "judicious use of advisory and subordinate policymaking bodies in the conduct of local services."

> Over a period of time a recognition has been growing on the part of all three jurisdictions of their community of interest in common problems. This recognition has taken a variety of forms, including exchanges of information, joint meetings of officials, and agreements to cooperate in certain service areas and to collaborate in the provision of facilities. Most recent and most important among these developments is

> the creation of the Richmond Regional Planning and Economic Development Commission. This body, though entirely advisory, manifests by its composition and its designation a clear official recognition of the essential unity of the region and of the need for broader joint endeavors in the future.

A 1967 report, prepared at the request of the boards of supervisors of Chesterfield and Henrico Counties and completed by the Space Utilization Associates, recognized, like the PAS Report, the community of interest of the three jurisdictions of the Richmond metropolitan area. Richmond School Board exhibit No. 47 is the SUA Report dated June 1, 1967. The later version of this report, that of June 12, is Henrico exhibit No. 25. Changes were made in the document at the request of the boards of supervisors of the two counties, who commissioned it. The first version of the SUA Report recommended that the State government insist upon regional solutions to metropolitan problems, backing its position with sanctions, if necessary. Henrico County Manager Beck characterized the SUA Report as at least in part a brief intended to advocate the county's position before the Hahn Commission, a State-level commission, which was at the time in the process of preparing a report recommending changes in governmental structure.

Based on commuting patterns, the SUA Report concluded that there was a relation of mutual dependency between the three jurisdictions. The SUA reporters stated:

> The central city is an essential element of the region as a major place of employment, the center of commerce, and the State capital, and, consequently, the problems affect the entire region. The other jurisdictions cannot dictate the affairs of the central city nor can they refuse to cooperate in the solution of its problems.

The SUA Report concluded that consolidation of governmental units would be the "idealized" solution to the problems of the area. However, they stated, that "without a change in attitudes or a crisis of major proportions, it would not receive the necessary voter approval."

Dr. Gross stated that an aerial photograph of Chesterfield County which he viewed did not resemble, as the question was put to him, the Richmond school community. He was quick to state, however, that he was referring to the city of Richmond proper. The photograph, for which has now been substituted one bearing county boundary lines, shows a great deal of undeveloped land. It also shows a considerable portion of suburban growth, as might be expected. Parts of the photograph resemble that park land which, citizens have complained before to boards of supervisors, is so scarce in the Richmond area.

In 1960 census figures indicate that 26.121 Chesterfield County residents reported as to their place of work. Of these, 12.053 or 46.1 percent worked in Richmond; 638 or 2.4 percent worked in Henrico County; 9,916 or 38 percent of the total, worked in their home county.

In 1940, 44,500 Henrico County residents reported their place of work to the census: 9,959 or 22.4 percent worked in Henrico; 1,632 or 3.7 percent worked in Chesterfield; and 31,023 or 69.7 percent worked in the city of Richmond.

Richmond city residents reporting a place of work in the 1960 census came to 83,734: 91.8 percent of these worked in the city itself; 3,186 Richmond residents worked in Chesterfield in 1960; this is 3.8 percent of the force. That year, 2,144 or 2.6 percent of the city work force, worked in Henrico County.

There has been much dispute about the percentage of inhabitants of the two counties who now work in the city of Richmond. Witnesses such as Burnett attempted to demonstrate, for example, that Chesterfield County, in fact, must be importing workers from outside the jursdiction because, based on his statistics, the county has more jobs available than it has workers. It strikes the Court that if the city of Richmond and Henrico County are in fact bedroom communities for Chesterfield, which to some extent, of course, they must be, it is all the more true that the area is a single urban community.

The 1970–71 survey of Henrico residents as to place of employment tended to show that 45 percent are employed in Richmond, whereas the figures in previous years has been much higher. In fact, the survey indicated that another residual portion of those polled might also work in Richmond. Furthermore, new industrial development within the past 5 years in Henrico can be expected to draw, as in the case of Chesterfield, Richmond residents into the county to new places of employment. Because a shift in the direction of economic dependency occurs, does not mean that it has ceased to exist.

The defendants assert that the speed and growth of cities generally depends upon the mode of transportation available. As a general fact this is true. However, it is important to note that the testimony of those experienced in municipal development was that the so-called 30-minute travel line, which moves outward as each new advance in transportation techniques is made, fixes not the area of necessary urbanization, but the bounds of possible growth. It strikes the Court as simply irrelevant that portions of the trijurisdictional area here in question, even large portions, are accessible within 30 minutes, from such cities as, say, Colonial Heights, Petersburg, or Hopewell. That fact shows only that those cities might have been developed that far in that direction. It does not show that this has come to pass. In fact, of course, it has not.

It is also of doubtful relevance that the 30-minute travel line, thanks to recent interstate highway developments, drawn about the Capitol Square area in Richmond, extends far into Hanover, Goochland, Louisa, Carolina, Charles City, and New Kent Counties. Again, such a line shows the area of potential urbanization, but not necessarily its reality. What it does tell the Court is that the area within such bounds, if it is highly developed, is that much more likely to form an integrated urban whole.

Officials of each county testified at length over the difficulties they had experienced in negotiating with Richmond officials over solutions to common problems. Several of the studies of local government in the area remarked on this as well. Such governmental infighting, in the Court's opinion, is not indicative of a lack of interdependency, of the nonexistence of common interests in the solution of regional problems, or that citizens of the area do not regard it as a single entity for purposes of the fulfillment of economic and social needs.

Indeed, the thrust of the plaintiffs' complaint and that of the Richmond School Board is that those charged with governing the three jurisdictions have been unwilling or unable to tackle essential common problems.

Most of the suburban growth in the area up until 1954 took place in Henrico County. Thereafter, Chesterfield County has experienced most of the rapid urbanization. By far most of the population of Chesterfield has settled there since 1950.

It is conceded by the executive secretary that in a sense Chesterfield County is an urban area. He so stated in the recent annexation proceedings. No longer does the county, bounded by rivers on north and south, sit in isolation. Under definitions applied by the Chesterfield County Extension Agent, based on U.S. Department of Agriculture data, there are 40,100 acres of built-up urban land in Chesterfield County; 209,000 acres or 73 percent of the county's area, is woodland. There are 24,131 acres in use as farmland.

The executive secretary of Chesterfield conceded that in his opinion those parts of Chesterfield County enclosed within subdivisions four and five of the Richmond Metropolitan Area School Plan could be considered suburbs of the city of Richmond. So they appear on the land use map, used to project development in that area of Chesterfield County. These areas are principally projected to be zoned R–1 or R–2, intended for residential use in the future.

Chesterfield's Exhibit No. 20, which depicts the area of the county within 30 minutes travel time of the center of the city, illustrates that vast parts of subdivisions four and five are within such limits.

The Court is satisfied that some areas of Chesterfield County are indeed wild land, suitable for sporting and recreational purposes. The inference is logical, however, that it serves as a recreational source for the Richmond metropolitan area.

The Manchester and Midlothian Magisterial Districts of Chesterfield County, the two districts most accessible to the core of the city of Richmond, enjoyed their greatest period of population growth in recent years in the year 1950 to 1960. In 1950 the population of Midlothian District was 4,371; 10 years later is was 10,759. In the same period, Manchester District grew from 13,016 to 31,892. In 1968, using the definition employed by the Bureau of the Census, in the area of Chesterfield County adjacent to the city of Richmond, there was no "urban" area outside of the annexation area sought. The annexation suit, however, did not result in the award of all of this territory to the city of Richmond. Moreover, these annexation case exhibits do not illustrate the full county area.

Furthermore, analysts addressing themselves to the specific characteristics of the Richmond metropolitan area have employed definitions of those areas which are distinctly not rural, and are in transition to urban status, which would include a much greater proportion of the county's area than that considered urban under census bureau standards.

Under the 1970 census date, the population density of the Chesterfield Magisterial Districts are as follows: Midlothian, 0.43 persons per acre; Clover Hill, 0.14; Dale, 0.45; Bermuda, 0.41; Matoaca, 0.21; average for the county, 0.27.

The defendants argue that the annexation absorbed into the city of Richmond a group of Chesterfield residents who, much more than those remaining in the county, tended to work in the city. Thus, the argument runs, if 48 percent of Chesterfield residents worked in Richmond prior to annexation, the figure is now much lower. In fact, according to one expert's testimony, the proportion of the annexed area residents working in the city was not much higher than 48 percent, and therefore, the 48-percent figure has not been much altered by the annexation.

Chesterfield County does have a community of interest with the city of Richmond. One witness suggested perhaps Chesterfield's common interest with three cities to the south was even greater. In support of this he mentioned long-term utility contracts with two of them. These facts indicate to the court that these small cities may in part be dependent upon the county for certain public services. By no means, however, are these factors demonstrative of anything like the economic interdependency of the individual citizens of the three jurisdictions of the metropolitan area. A view of the map shows that, whereas urban development of the city of Richmond has extended deep into Chesterfield County, that of the three cities to the south is almost entirely confined within their borders.

On May 8, 1963, the Chesterfield County Board of Supervisors passed the following resolution:

> Whereas, the various localities in the Richmond-Petersburg area have expressed a desire to invite new industrial plants into the area; and
>
> Whereas, there are several separate organizations attempting to accomplish this end at this time; and
>
> Whereas, it would seem that each locality would benefit from a centralized, cooperative effort in the attraction of industry;
>
> Now, Therefore, Be It Resolved, on motion of Mr. Goyne, seconded by Mr. Driskill, that this board of supervisors hereby respectfully requests the Richmond Regional Planning Commission to attempt to form a regional industrial commission composed of as many localities as possible to take such steps as are necessary to accelerate the industrial development in this area.

In the minutes of the Chesterfield board of supervisors of February 14, 1968, there appears the following resolution:

> On motion of Mr. Martin, seconded by Mr. Purdy, it is resolved that the executive secretary be directed to write a letter to the county of Henrico informing them that Chesterfield desires that any relocation outside the city on the proposed merger of the Medical College of Virginia and the Richmond Professional Institute be made in Chesterfield County.

In the middle of 1968, Chesterfield County joined in forming the Capital Regional Park Authority with Henrico and Richmond.

The county of Chesterfield enjoys reciprocity in business licensing with all four cities on its borders, with minor exceptions.

On January 1, 1970, with the annexation of 23 square miles of Chesterfield County territory, Richmond acquired about 70 percent of the retail sales then made in the county.

On August 9, 1961, the Chesterfield board of supervisors declined to appoint an advisory committee to negotiate a consolidation agreement with the city of Richmond. They obviously were reacting to a threatened annexation suit.

A county official explained that Chesterfield County citizens banded together to oppose annexation efforts because they desired to keep low the cost of welfare and governmental administration, and knew they could achieve this living under their county government.

On October 28, 1970, there was a discussion during a regular meeting of the board of supervisors of Chesterfield County of proposed amendments to the Virginia constitution. C. J. Purdy, a member of the board, predicted that "Richmond" would ask for a merger of the school districts. The board unanimously passed the following resolution:

> Whereas, the board of supervisors of Chesterfield County has determined that the consideration by the voters of this county of the proposed revised constitution of Virginia is very important; and
> Whereas, the board of supervisors has considered the proposed revised constitution, and believe that approval of that revised constitution would be highly detrimental to local school systems throughout the Commonwealth, and particularly in Chesterfield County, and woud be detrimental to local government in Virginia; now, therefore, be it
>
> *Resolved*, That the board of supervisors of Chesterfield County, meeting in regular session this 28th day of October 1970, urge all the citizens of Chesterfield County to vote "No" on question No. 1 of the proposed revised constitution on November 3, 1970.

Irvin G. Horner, currently chairman of the Chesterfield County Board of Supervisors, commended to his citizens

> . . . a revolt in the form of a school boycott, separate private school system, or even freedom of choice school assignments and letting Federal troops see what they can do about it, rather than integrate the schools in Chesterfield County with the city of Richmond.

This statement, he explained, was made shortly after the decision of the Supreme Court in the *Swann* case. Moreover, he said,

> Chesterfield residents at the time were bitter at what they saw as continued harassment by the city to the north. . . .
>
> And when this *Charlotte-Mecklenburg* case was handed down the people of Chesterfield County were fit to be tied. I acted or reacted in a manner that I am confident that the people of the political jurisdiction felt because I was registering their feeling.

Horner characterized the *Swann* decision as contributing to un-Americanism in that it might lead to the destruction of community schools. The thrust of this statement was to dramatize his opposition to consolidation of the county school system with that of Richmond, leading the court to the obvious conclusion that the constitutional rights of the plaintiff class will, if left to the consensus of the political leaders of the areas involved, with rare exception, continue to be abridged.

From 1951 to 1960, the county of Henrico increased in population from 57,000 to 116,000, a growth of 104 percent. The 1970 figures for Henrico show a total population of 154,364. There are 144,258 whites and 10,106 blacks.

In 1957, the Henrico Board of Supervisors voted to join the Richmond Regional Planning Commission because they thought indeed that regional problems existed, and desired, in a spirit of cooperation, to attempt to solve them on that basis.

The Henrico Board of Supervisors created a body known as the Henrico County Metropolitan and Government Study Committee to examine and recommend solutions for metropolitan area problems. In addition, the board directed the county manager to engage the Bureau of Public Administration of the University of Virginia in an advisory capacity. These actions were taken on January 13, 1960.

On July 28, 1960, the Henrico Board of Supervisors, in response to the recommendation of the public administration service report that the city of Richmond and the county of Henrico be consolidated, appointed an advisory committee to consult with such a body from the city of Richmond and to negotiate a plan of consolidation. The city responded in kind. A favorable report was submitted by the committee on July 31, 1961, and the Henrico Board of Supervisors approved the agreement on October 10, 1961, providing for the merger of the county and the city of Richmond. When submitted to referendum, however, the merger plan failed because a majority of Henrico residents voted against it.

Thereafter, the city of Richmond commenced a lawsuit in the State circuit court to annex a large portion of Henrico County. The city sought 168 square miles; the court awarded the city about 16 square miles for which the city was to pay the county approximately $41 million and on which the city would be required to spend $13 million in introducing capital improvements. Had Richmond accepted the annexation award of the Henrico court, there would have been added to the city school system 124 black and 8,047 white schoolchildren as of that date. There was, however, no high school located in the annexation area awarded by the Henrico court. Richmond, in 1965, rejected the annexation court's judgment, as it may do under State law.

The city of Richmond and Henrico County entered into contracts concerning water and sewerage utilities on an intermittent basis over a number of years after World War II. In 1968 they signed a 20-year contract covering these utilities. In the past, by agreement, Richmond Bureau of Fire Protection had been extended to certain sites in Henrico County.

In 1962, approximately 66 percent of employed Henrico residents worked within Richmond city. In the last 5 years Henrico has enjoyed substantial industrial growth, primarily in the east end of the county.

Currently, plans exist to build a new bridge at one of two possible locations to facilitate transportation directly between Henrico and Chesterfield County.

Henrico exhibit No. 36 illustrates 30-minute traveltime from the center of the city of Richmond, making use of interstate highways. The 30-minute travel zone extends further on this exhibit than on those offered by the city of Richmond. The court does not consider such demonstrations to be dispositive of very much at all. Once the point has been made that economically and socially the county of Henrico is very much integrated with the city of Richmond, it matters little at this date what the possible boundaries of future expansion may be.

On Janary 25, 1967, the Henrico Board of Supervisors passed a resolution stating its opposition to any modification in the State laws controlling merger or consolidation of political subdivisions which might allow a majority vote of the entire area in question to decide the issue. At present, the law requires a majority vote of each area involved in a proposed merger.

On February 14, 1968, the Henrico Board of Supervisors passed a resolution stating its opposition to a bill pending in the general assembly to merge, without popular vote, the city of Richmond and the county of Henrico.

On November 25, 1970, the Henrico Board of Supervisors directed its clerk to advertise for public hearing an ordinance repealing that which established the Capital Region Park Authority.

On December 25, 1970, the Henrico Board of Supervisors voted that it would no longer consider remaining as a member of the Richmond Regional Planning District Commission unless the city of Richmond were actively to promote legislation to prohibit the use in a court of law as evidence cooperative undertakings of that nature "to the detriment of any political subdivision."

The city school board has one school in Henrico County, and owns a site for one in Henrico on which no facility stands.

Richmond Metropolitan School Data

In 1919, the Richmond school system was 29.9 percent black and 70.1 percent white. Twenty years later the system was 63.9 percent white, and in 1949 it was 59.2 percent white. In 1954–55, the year of the *Brown* ruling, it was 56.5 percent white, and presently is approximately 30 percent white.

The freedom of choice plan implemented in 1966 in an effort to desegregate the Richmond city schools did not achieve that aim, and by 1970, schools in the Richmond system still retained their segregated character. This was evident both from figures showing student body composition to vary greatly from the systemwide and communitywide ratio of racial distribution, from the fact that many of the facilities were occupied by students nearly all of one or the other race, and by segregated patterns of faculty assignment. In September of 1969, the Richmond system was 70.5 percent black.

In September of 1970, the Richmond school system, because a recent annexation had brought into the city an area populated principally by whites, was 64.2 percent black and 35.8 percent white in student body population. This was the year in which the school board was directed by this Court to implement the so-called interim desegregation plan. Enrollment figures under that plan are shown on the chart.

The white student population in the Richmond public schools has fallen from a 1954–55 total of 20,259 to a 1969–70 total of 12,622. After the Chesterfield annexation in 1970, it was predicted that there would be 20,400 white students in the Richmond schools. Instead, 17,203 enrolled. For the current 1971–72 school year approximately 13,500 whites are enrolled.

During the corresponding period, 1954–55 through 1969–70, the black student population rose from 15,598 to 30,097. In 1970–71 there were 30,785 black students in the Richmond public schools. During the current 1971–72 school year, 29,747 are registered.

Therefore, in the last two sessions Richmond schools lost over 7,800 white students from their projected figure.[21]

In the school year 1960–61, the Henrico County school system was 93.33 percent white and 6.67 percent black. Ten years later the pupil population was 91.87 percent white and 8.13 percent black. During that decade, the pupil population rose from 24,059 to 34,470. Currently Henrico operates 43 school facilities. In 1971–72, Henrico enrolled 31,299 white and 3,018 black students.

Chesterfield's school system in 1966–67 and in 1970–71 was about 90.5 percent white. The proportion of whites in this county has been steadily growing; at one time the Chesterfield system was well over 20 percent black, and in 1955, it was 20.4 percent black. In 1971–72, Chesterfield enrolled 21,588 white and 2,166 black students.

Taking the three jurisdictions together, the Court observes that in the past 10 years, although the total number of pupils enrolled has risen from 82,761 to 106,521, the racial proportions have remained quite constant, at about 67 percent white and 33 percent black. The Court finds that the statistical information contained on Richmond School Board exhibits Nos. 75–78 is correct.

The Court adopts the findings in its prior opinions as to the racial composition of Richmond City schools in 1969–70, and in 1970–71. Attendance data for 1971–72 are also in the record; the Court finds those for September 24, 1971, the most reliable index of the schools' composition throughout the remainder of the year.

Undoubtedly, the white school divisions of Henrico and Chesterfield contributed to the apparent white flight. The two counties have had a rapid gain in white school attendance in the years 1955–70; it rose from about 23,000 to nearly 60,000. Their black total school population has risen slowly, not going far above 5,000. Richmond City has experienced a much faster rise in black than in white membership.

In 1950, the population of Chesterfield County was 20.9 percent black. In the school year 1953–54, Chesterfield County public schools were 20.4 percent black; there were 7,429 whites and 1,903 blacks in the county's schools. In 1950 Henrico County was 9.9 percent black. In 1953–54 Henrico schools were 10.4 percent black; this reflects 1,371 black pupils and 11,771 white.

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[21] See RSBX Substitute Exhibit 30, and comparison compilation submitted by Richmond School Board, pursuant to order of April 5, 1971.

Dr. Thomas Little, associate superintendent of the Richmond City public school system, supervised the preparation of the proposed Richmond metropolitan area desegregation plan. The objectives are summarized as part of the plan. Within the context of administrative and operational feasibility, the planners sought to achieve a "viable racial mix" for each school within Richmond, Henrico, and Chesterfield. The source data upon which the plan was built consisted of attendance figures for September of 1970 for the county systems and figures calculated from spot maps and proposed zones prepared by the Richmond school authorities. The proposed metropolitan plan is based upon the September 1970, patterns of school organization and grade structure within each of the separate units.

Each subdivision of the metropolitan school division, with one exception, itself contains a racial mix of pupils fairly close to that of the system as a whole. The total pupil population of the subdivisions varies from 9,387 in subdivision 6 to 20,059 in subdivision 2. Subdivision 6, comprising the southern area of Chesterfield County, is much the most sparsely populated.

Under the attendance plan devised, not all students will attend a school located within subdivision of residence; 7,668 pupils will attend schools the zone lines of which are cut by subdivision boundaries. In each case, their school zone will be contiguous to their subdivision of residence. That some would cross subdivision lines would be necessitated by the fact that the plan is predicated upon existing school zone lines, which are not congruent at the elementary, middle and high school levels. Some of the zones, therefore, have to be split between two subdivisions.

In order to determine the "viable racial mix," [22] the Richmond planners refer to the overall racial proportions in the community.

As Dr. Gross put it, and as it was phrased by all those who testified in support of the metropolitan plan, "the theory upon which that desegregation proposal was based, was to distribute the pupil population the way they would be if no other factors were operating." He rejected the interpretation placed upon the goal of placing 20 to 40 percent black students in each school as the imposition of a "fixed racial quota," and the court so finds. Rather, he saw that ratio as established by the existing demographic proportions in the Richmond area. If the goal were achieved, Negroes would be in a minority in each school. But again, this corresponds to reality in the Richmond metropolitan area and in the Nation as a whole, in fact.

No educational expert testified that it was repressive or inhibiting of educational development for a black child to see himself as a member of a numerical minority in his school.

From an educational standpoint, Dr. Little supported the idea of a distribution of faculty and staff in each school according to the overall system's ratio. It is of educational benefit to both white and black children to maintain black administrators in positions of authority as the system undertakes desegregation. Indeed, it would be most beneficial to the students if the percentage of black teachers in the system were raised, by affirmative hiring policies, to a level approximating that of the black pupils in the system.

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[22] The term "viable racial mix" was defined by Dr. Little as "It is a racial mix that is well enough established that it will continue to prosper. It will be a desirable, reasonable mix for educational purposes. * * *"

Working from the average percent of capacity utilization in each subdivision, the capacity of each building, and the current enrollments therein, the planners calculated, by computer, the number of white and black students required in each facility in order to deliver the racial mix they sought. The latter ratio was established by the overall subdivision ratio at each level. From this date they calculated the number of students of either race who would have to be assigned into and out of each particular school in order to achieve the enrollment goal.

They attempted to insure that no building would be required to house more students than its rated capacity or than it had held the previous September, whichever was larger. This capacity limit was exceeded only slightly in four schools.

As to each school with a surplus of pupils of one race or another, it was determined to which other facilities within the subdivision they might be assigned. The choice among these was made on the basis of proximity. The distances between the possible receiving and the sending schools were calculated. Then the average distance for all transportation combinations was found. Based upon that figure, the pupil exchange combinations to be proposed were selected by a computer, which had been instructed to pick out those combinations with school-to-school distances closest to the average. The computer was also programed to deviate no more than 50 percent above or below the average. In some cases it was necessary to deviate further from the average, but in nearly all instances the variation was on the low side. As to each school it was then calculated the number of buses needed to transport the students being reassigned.

As noted, the metropolitan plan for pupil assignment is based upon a zone plan. Because some students from nearly every zone must be transported to a school outside that zone, a method of selecting whom to transport has to be devised. Conceivably, a system of satellite zoning could be employed. Under such a system, a portion of the sending school's attendance zone would be designated as the area from which residents would travel to the more distant school. For administrative reasons, in order to use a more impartial system and in order to avoid any possible unintended effect upon property values within a particular area, the school board of Richmond expresses a preference for a lottery method of assignment. The Court is of the opinion that, so long as the method chosen does not materially threaten the success of the plan, the particular assignment technique adopted is within the discretion of the school authorities. The lottery technique sacrifices something in speed and efficiency of transportation because bus pickups must be made throughout an attendance zone, rather than in a small satellite zone carved therefrom. For that reason, Richmond officials modified their proposal as written to the extent that in some of the sparsely populated areas, a satellite zoning arrangement might be used. Foreseeably, subjectively designated areas from which pupils will be transported to more distant schools will prove acceptable in those areas, as well, because appreciable-distance busing is an established fact there now anyhow.

Under the lottery program developed by the Richmond officials, whether a child is among those normally assigned to the school in his attendance zone who would be transported elsewhere, is determined by birth date. A single birthday or 366 might be picked out of a hat. Then, starting with the first picked and taking all born subsequently, or following the list of 366 in order drawn, sufficient pupils are chosen to meet the quota of those to be transported out. After the child's status is determined according to the lottery, he would remain with his fellows during his tenure at each level of school. A new lottery would be conducted for him as he moved into middle school and later into high school.

The Richmond administration developed considerable expertise in setting up transportation systems, when they created the one in use the current year. Problems turned out to be less than anticipated. In fact, by fixing three different opening times for schools, so-called staggered hours, they were able to use their bus fleet more efficiently than expected and in fact discovered that they had surplus equipment on hand. Estimates of busing times turned out to be accurate in most instances, and sometimes substantially higher than the time actually required. The transportation distances involved in the proposed metropolitan plan are roughly comparable to those under the desegregation plan now in effect in Richmond, which the Court finds reasonable. The only area in which appreciably longer routes are proposed is subdivision 6, where long-distance transportation is a fact under the independent Chesterfield County program now in effect.

Operation of the Richmond metropolitan plan will entail the transportation to school of approximately 78,000 of the 104,000 pupils in the system. Of these, 42,000 will be pupils taken from near their homes to a school in their attendance zone of residence; 36,000 will be pupils exchanged between schools; that is, they will travel to schools outside their zone of residence. A little over half of that 36,000 would be white pupils. Currently in the three school divisions, operating independently, 68,000 pupils are transported to school.

Based on an average bus capacity of 66 elementary pupils or 44 secondary pupils, and predicated upon a daily schedule using three different opening hours in each subdivision except subdivision 6 with two opening times, 524 buses would be necessary to meet the transportation needs under the metropolitan plan. Opening times would be spaced at 45-minute intervals, save in subdivision 6 where a 1-hour interval would be used. The current bus fleets of the three existing school divisions are adequate to meet transportation requirements. Assuming that buses can be used at 90 percent of capacity, this is a realistic possibility. Under the plan currently in effect in the city and under the metropolitan plan, it would also be possible to schedule buses to return to school in the late afternoon to pick up those who wish to remain to participate in extracurricular activities.

Under the metropolitan plan, busing times would be limited to 1 hour. Outside of subdivision No. 6, traveltimes would be held to a maximum of 45 to 55 minutes. The precise traveltime cannot be ascertained until the distribution of students to be transported is known. It is obvious, however, that the time will not exceed that which each county has required of their students for many years past. Most students would travel for a much shorter time than 45 minutes to 1 hour, the maximum in different sections of the division. The busing times estimated by Dr. Little do not cover merely transportation from the sending school to the receiving school, but include also an allowance for time to pick up children near their homes.

If, in some instances, the lottery method results in a bus route that is so tortuous or extended as to take an excessive amount of time, it may be in whole or in part abandoned. The entire metropolitan plan does not stand or fall with the lottery assignment technique. Although the law of averages indicates that those picked to be assigned outside of their residence zone would be distributed about the zone approximately as is the total population there, if in certain instances a small number of children are picked who live in a remote area, administrators will be free in their own judgment to determine whether their presence in the assigned school is worth the added time and expense of transporting them there. Or, if a transportation route over a large area proves inordinately roundabout, those in charge may determine that this area would more feasibly be divided into satellite zones. These administrative decisions can be made without impairing the basic structure of the metropolitan plan.

As in all school systems, too, as population movements occur and new schools are built, it would be necessary to change zone lines. There would be some consequent reassignment of students from one school to another, as is always the case when this occurs. Another proviso is that if the lottery as applied to a particular school zone picks a group of children to be transported who are not evenly distributed according to grade level, the lottery method might have to be applied to grades individually, selecting from each level the number required to be subtracted in order to bring that level toward the desired racial mix. The need for this is unlikely, because the greater the number of students to be taken from a particular zone, the greater is the likelihood that the lottery will choose pupils randomly distributed according to grade; and the fewer to be taken from any one school zone, the less important will be any nonrandom distribution.

The proposed Richmond metropolitan area plan deals separately and differently with the rural southern portion of Chesterfield County, which would be administered as subdivision 6 of the metropolitan school system. Such a scheme gives recognition to the more rural character of this area and out of considerations of practicality eschews the long-distance transportation which would be required if students in this area were taken into the core city. On account of the area of the southern portion of Chesterfield County, Dr. Little would recommend that this portion of the proposed subdivision 6 be treated on a different basis than the rest of the metropolitan system, which is desegregated by means of a lottery plan. Some of the facilities in this area are currently desegregated. However, the Curtis and Bensley Schools still have nearly all-white enrollments, and the Matoaca Laboratory School is almost all black. Simple pairing might solve the problem. Were the latter facility to be divorced from the Chesterfield system, the integration of those white schools would become substantially more difficult.

A county school official utilized the techniques suggested by the Richmond School Board in its metropolitan desegregation plan in application to the Grange Hall area of Chesterfield County. According to the plan, one busload of Grange Hall students would attend the Curtis School. The test route developed required an unreasonable degree of time to traverse, and the court would not approve any such facet of the suggested plan. However, in testing the feasibility of the Richmond metropolitan area plan, there was selected the most rural section of the county for the experiment. It would be possible, of course, even using the county's experimental route, to reduce the traveltime by using more than one bus to cover the route. Moreover, some 22 of the 57 students picked up live in close proximity to one road.

Concerning the lottery experiment performed by Chesterfield school officials in the Grange Hall area, Little said, and the court finds, that substantially shorter busing rides could be accomplished by the use of smaller buses. In any event, if the lottery system results in too long transportation times, simpler means could be used. An island zone could be formed in the Beaver Bridge Road area. The Bensley School could be desegregated by a simple alteration in zone lines. Curtis then could be desegregated by pairing it with Matoaca Laboratory School.

Henrico County school officials performed a hypothetical "birthday lottery" to a group of students who would be assigned to a core city school under the Richmond metropolitan area plan. They currently attend the Varina Elementary School and Varina Annex. Using two buses, Henrico officials, with the assistance of experts from the State department of education experienced in the formulation of transportation routes, developed routes of 45.6 and 54.4 miles in length: traveltime was unreasonable. Dr. Little noted in his own testimony that the transportation out of the Varina Annex area under the lottery plan might best be done by some other means than two standard size buses. Three smaller ones might be more efficient.

In addition, the area chosen for this experiment is one which Dr. Little stated might best be approached by the use of an island zoning technique. Using that tool, he easily developed a plan to take the required number of Varina residents into the Richmond schools in probably less time than is required to carry them to the Henrico schools they currently attend. Unquestionably a school administrator is bound to exercise his judgment rather than adhering blindly to a uniform system. Dr. Little obviously has an open mind as to the use of the lottery system in a district such as Varina if transportation times proved prohibitive there.

The court finds that the use of an island zone would solve the desegregation problem in the Whitcomb Court School rather easily.

The Henrico school official stated that his staff did have the skills to prepare a desegregation plan encompassing the Varina area of Henrico County. He suggested that it might be most economical to assign all children within walking distance to their neighborhood school and then transport the rest by bus either to nearby Henrico schools or to other facilities as necessary to achieve the desired racial ratios. It is to be recognized that Dr. Little in preparing the suggested plan, which the court finds reasonable, has done so without the benefit of any cooperation from the respective county school officials. Their cooperation and expertise will undoubtedly make the task easier.

In numerous instances Richmond city and Henrico County schools of extremely divergent racial composition are located a very short distance apart. The following table illustrates this and gives the black occupancy of each facility, showing, for Richmond schools, the 1970 and 1971 percentage figure as of September 17, 1971, and the white occupancy of the Henrico facility as of the 1970–71 school year.

Richmond schools	Black (percent)		Henrico schools	White (percent), 1970-71	Distance, miles
	1970	1971			
1. Armstrong High	75	72	Highland Springs High	86. 8	5. 0
2. Armstrong High	75	72	Varina High	84. 2	6. 2
3. Kennedy High	93	88	Highland Springs High	86. 8	5. 7
4. Kennedy High	93	88	Henrico High	96. 1	4. 9
5. John Marshall High	73	78	Henrico High	96. 1	[1] 1. 4
6. Mosby Middle	95	86	Fairfield Junior High	81. 9	3. 6
7. East End Middle	68	67	Fairfield Junior High	81. 9	3. 6
8. Fulton-Davis Elementary.	53	50	Montrose	100. 0	1. 8
9. Mason	100	83	Adams	86. 4	3. 1
10. Highland Park	90	85	Glen Lea	99. 8	1. 3
11. Stuart Elementary	91	79	Laburnum	79. 6	2. 2

[1] Eight blocks.

A pupil's achievement is not likely to be affected adversely by the assignment system used under the metropolitan plan proposed; no research indicates that it would be. In any event, the proposal is not just to transport a few individuals, but rather very large groups of pupils from one area to another; thus, they would not be totally separated from their neighborhood peers.

The evidence preponderates that a bus trip of an hour for elementary children is not educationally harmful.

There is no substantial adverse effect on the black child caused by an awarness that he is being transported, with other black children, by reason of his race. As well as can be predicted, his perception will be that restraints have been lifted and he is permitted to attend school with white children. More important than the means of transportation is the goal: A school which is perceived neither as superior nor inferior. In short, if the goal is a positive one such as integration, busing certainly as to blacks will not be viewed negatively, for such a practice denotes relief from containment rather than a perpetuation of it.

For administrative purposes, Dr. Little recommends adherence to the State law pattern which now requires a single school board for each school division. If a nine-member board is used and its membership is allocated on a population basis, the city would choose four members, Henrico County three, and Chesterfield two. Several other educational experts testified in support of the single-board plan, and the court finds that for the coordination of school policy in general it is the preferable system.

The three political subdivisions in the Richmond metropolitan area now appoint school board members by different means. Richmond school board members are appointed by city council for a term. Chesterfield County school board members are picked by a school trustee electoral board. Henrico's school board members are chosen by the board of supervisors and serve at their pleasure.

The pupil population of the combined system is estimated to be 104,000.

The consolidated system is to be divided into six subdivisions. The proposal includes the delegation of administration and curriclum decisions to subdivision heads. This practice would be in conformity with the generally accepted educational practice to delegate certain functions to be discharged by smaller units in school districts above a certain size, in order to make the system responsive to the special needs of smaller areas.

Duties of the subdivision directors would principally be in the area of supervision of instruction, decisions concerning curriculum, and maintenance of close contact with parents of children in their schools. It is suggested that a lay-advisory subdivision school board be set up in each subdivision in order to involve local residents in the decision-making process. No precise decision as to what authority such boards would have has been made.

The suggested decentralization will, from the evidence adduced, lead to better communication between the patrons and the administrators.

The metropolitan plan as now formulated is based on attendance figures from September of 1970. It demonstrates, however, the feasibility of the techniques employed. Furthermore, its current form can be brought up to date rapidly to conform to current attendance statistics and capacity figures with a few hours' work with the computer.

Approximatley 3 to 6 months would be required to implement all **aspects of the metropolitan** plan, including updating and determination **of transportation routes.**

Any one of the school administrations involved herein could design a desegregation plan to achieve roughly equal racial proportions in schools throughout the Richmond metropolitan area. Neither of the defendant counties has undertaken to develop any proposed desegregation plan in cooperation with the city. It is apparent that the combined efforts of the city, the counties and the State authorities can lead to an even better plan than the one now before the Court—nevertheless the plan now proposed will be acceptable and the Court will be readily available to consider suggested modifications.

The metropolitan system would be smaller than the Fairfax, Va., system.

In the fall of 1970, only about 28 school "districts" existed with a school population of 100,000; 163 districts existed with a population of 25,000 to 99,999.

The Fairfax, Va., system has subunits of about 25,000 to 30,000 pupils and provides, in the words of Dr. Kelly, quality education. The Richmond metropolitan plan contemplates subdivisions of approximately 20,000 pupils.

Current studies on optimum school district size focus principally on the minimum size required for a particular purpose. As new educational imperatives come to light, the minimum practical school district's size may change and rise. One such goal which educators currently recognize is the necessity, for pupils who will live in a biracial community, to include the component of meaningful integration in their education.

The capacity to deal with desegregation problems is one factor by which to test the merits of the proposed merger.

Educational and administrative experts have testified that the proposed plan is a sound and feasible one, educationally and administratively, and the Court so finds.

The Public Administrative Service report in 1959 brought attention to the need for coordination in the development and operation of the area's school facilities:

> The possibility of annexation has caused the counties to be hesitant about building schools in areas which might possibly be taken into the city; yet, it is in these areas that the schools are most needed. Plate 2–5 shows the distribution of schools throughout the region, by type. [In this illustration the schools are racially designated.] Table 2 shows total enrollments and annual increases in enrollment for three jurisdictions during the period from 1950–51 to 1957–58. In this period, the maximum growth in Chesterfield and Henrico Counties took place in 1955–56, whereas it occurred in Richmond earlier, in 1952–53. The present composite rate of growth is about 3,000 per year.
>
> Shortages of physical plants are causing both of the counties to have fairly extensive "shift" operations in their school buildings, and Chesterfield County is using a number of rented facilities. Richmond is "double-shifting" only in the beginning grades.
>
> With the combined school enrollment of the two counties rapidly approaching that of Richmond, and the combined annual expenditures of the three school jurisdictions now in excess of $20 million, there is special need for achieving maximum economies in the management of the public education system of the region. Administrative costs of the three systems total about $300,000 annually, or about $0.75 per capita.

The PAS reporters did not recommend the combination of Chesterfield County's government into a consolidated Richmond-Henrico one. They based this judgment on such factors as the independent utility development of Chesterfield County, the existence of recently constructed county administrative facilities, the traditional maintenance of a low level of governmental service, and the county's ties to the three southern cities, Colonial Heights, Hopewell and Petersburg. Most of these distinguishing factors do not bear upon the question of whether school systems alone should be combined. The finding of disparity in levels of governmental service, in addition, is certainly incorrect if one focuses upon educational expenditures. Chesterfield in the recent past has devoted very considerable resources to new school construction.

Although the point is disputed, and is of collateral importance, it seems probable that some educational tasks can be carried on at less cost by the combined unit than by the existing three separate school divisions.

The minimum school district size to achieve substantial integration and to eliminate the effect of State-imposed segregation, would be that of the division created by the merger of the systems of Richmond, Henrico, and Chesterfield.

The county and State defendants assert that, if consolidation is brought about, the resulting Richmond metropolitan area school division will be racially identifiable, surrounded as it is by several political subdivisions of strongly disparate racial proportions. To begin with, racial identifiability depends to a great degree upon the individual's preception of the community within which comparisons are to be made. Richmond natives do not contrast the makeup of their schools with the composition of schools located a great distance away. Simply, the notion does not leap to mind that an alternative pupil assignment arrangement, attaining greater racial parity, could be made of pupils attending a Richmond school and one in southwest Virginia. Identifiability is a matter of contrast and the perception of obvious alternatives.

Furthermore, none of the defendants asserting the identifiability as white, of the consolidated division, has moved to alleviate that result by appropriate remedial action. It may be in the future one or more of them will do so. It may also be that, due to the sparsity of population in some of the adjoining counties, the task will not be difficult. Such steps are not barred by the order of this Court; in any event, the Court stands ready to amend or modify its order as necessary.

Dr. Pettigrew conceded that the proposed metropolitan system would have on its borders some counties with black school populations far above the proportion in a combined Richmond, Henrico and Chesterfield. He saw this as no barrier to the action he recommended. These counties are sparsely populated. He would recommend, consistent with his position, that the State board of education examine the possibility of incorporating some of these other jurisdictions into a metropolitan system.

It has been stressed, particularly by Henrico, that Hanover County might well be considered, along with the other three jurisdictions, to be properly a part of the Richmond metropolitan area. It is included within the Standard Metropolitan Statistical Area of Richmond established by the Bureau of the Census. It is also part of the Richmond Regional Planning District. It is, moreover, not distant from the city and many of its residents may find employment there. Some of its schools are closer to Richmond city schools than are the Henrico schools to which the Richmond School Board proposes to transport Richmond residents now attending city schools. None of those defendants, however, has sought to bring Hanover County officials into this lawsuit. The decision of legal questions flowing from any such action will abide the event.

INTEGRATION

Social scientists generally concur that one of the most vital elements of equal opportunity in education is the effective integration of schools. This is essential for children of both major races. The evidence seems clear that the benefits of an integrated education are most attainable if it is available to the child from the earliest grade.

To remove the racial identifiability of individual schools creates the opportunity to bring about in students attending them self-perception and aspirations not colored by notions of artificial advantage or disadvantage related to race.

Attitudinal effects made attainable by the desegregation of schools are very likely to have a positive effect on achievement. Access to inter-racial education engenders in black pupils the ability more realistically to perceive the relation between their own efforts and attainable goals, which effect in turn boosts achievement.

In order to determine whether a school has, in the full sense, granted its pupils an equal educational opportunity, it is necessary to observe not only how they perform on achievement tests while in school, but also how well they were able to grapple with American society and participate in its life. Education should give the student an opportunity to participate fully in American society. This opportunity is denied when the pupil is exposed to the sort of segregation existing in the Richmond area, just as it was by that which drew the Supreme Court's condemnation in *Brown*.

The performance of a particular school is not measured solely by its pupils' performance on achievement tests. It has become accepted among educators that attitudinal development is a legitimate and necessary part of the educational process. The development of realistic attitudes toward members of the opposite race requires a racially integrated school environment, something which is not at all equivalent to the mere presence of members of two races in the student body, but which cannot be achieved without that.

To achieve "integration," in Dr. Pettigrew's terms, one must have the "mix plus positive interaction, as we would want to say, between whites and blacks." Current research indicates that in order to achieve these benefits there is an optimum racial composition which should be sought in each school. Dr. Pettigrew placed this at from 20- to 40-percent black occupancy. These figures are not at all hard and fast barriers, but merely indicate to the racial composition range in which interaction of a positive sort is the more likely to occur. Social science is not such an exact science that the success or failure of integration depends upon a few percentage points. The low level of 20 percent fixes the general area below which the black component takes on the character of a token presence. Where only a few black students are in the particular school, there simply are insufficient numbers for them to be represented in most areas of school activities. Such participation would be crucial to the success of integration. The high level of 40 percent is linked not to the likely behavior of the students so much as it is to the behavior of their parents. When the black population in a school rises substantially above 40 percent, it has been Dr. Pettigrew's experience that white students tend to disappear from the school entirely at a rapid rate, and the court so finds. This is only possible, of course, when alternative facilities exist with a lesser black proportion where the white pupils can be enrolled. The upper limit, then, relates to stability. Dr. Pettigrew noted that the Central Garden School, in Henrico County, had experienced such transition when its black population rose to near 60 percent, it rapidly turned to nearly all black in a very few years.

Dr. Pettigrew's objections to the existence of a school with an over 40-percent black population relate both to the foreseeable instability of such a facility and the perceived inferiority in the eyes of the community. Dr. Pettigrew's upper limit of 40 percent, determined as it is by considerations of stability, varies with local circumstances affecting the tendency to instability. He would not adhere to a 40-percent guideline in a metropolitan area where the black population in school was above 40 percent.

In schools with the optimum racial mix across the country there seems to be beneficial effect upon community perceptions of the facility, the teachers' expectations, and even administration. The impact upon teachers' expectations is particularly significant, since social scientists have been able to demonstrate that students' performance tends to rise when teachers are confident of their students' learning ability. This seems to be linked to the natural inclination of the teacher to expend greater effort upon those perceived as likely to succeed.

Based upon projected enrollments under the current assignment plan for Richmond City schools, very few students will be in schools with a black population of 20 to 40 percent. At the elementary level, 3.04 percent of the black students and 9.43 percent of the white students will be in such schools. In middle schools, 9.2 percent of blacks and 26.7 percent of whites will be in schools in that range. There will be no high school students in such schools.

In Henrico County, based upon 1970–71 attendance patterns, 14.7 percent of the black students will attend schools with a 20- to 40-percent black enrollment; 5.4 percent of white students in the elementary level will do so. At the middle school level, 1.3 percent of black students and 0.2 percent of white students will attend such schools. Again, there will be no high school students in such schools.

In Chesterfield County, based upon similar data, 34.24 percent of black elementary students and 9.6 percent of white elementary students will be in 20- to 40-percent black schools. At the middle school level 47.2 percent of black students and 7.6 percent of white students will be in such schools. As in Richmond and Henrico, there will be no high school students in schools of this range.

If the Richmond metropolitan area consolidation plan were implemented, 97 percent of black students in the area would attend schools in the range of 20- to 40-percent black; the remainder would be in 15- to 20-percent black schools. Under that plan 92.5 percent of the white students in the area would be in schools of the optimum mix determined by Dr. Pettigrew, and 7.5 percent would be in schools with a 15- to 20-percent black enrollment.

As best we now know, and as best as can be proved, opportunities for achievement and healthy attitudinal development for all pupils would be substantially raised if the school systems in the Richmond area were organized under a metropolitan plan. Members of each race would have a substantially greater opportunity to develop realistic attitudes toward the other race, productive of friendships and positive social behavior. The likelihood of interracial hostility will substantially diminish. These are all accepted as legitimate educational goals.

One of the measures of socioeconomic status, often used by social psychologists, is parental educational attainment. In areas like Richmond, this is largely a function of educational opportunity available in previous years to black parents. One expert described the phenomenon as a generational cycle: "[D]iscrimination of the last generation against black parents in effect ends by damaging the black child today because of (the) inability of his parents to have received an adequate education as a child."

Because they were subjected to deprivations, such as a segregated educational system imposes, the social class factor is to a major degree traceable to State action in the past which denied equal educational opportunity.

Between the school years 1925–26 and the year 1963–64, the ratio of white to black pupils enrolled in State public schools rose from 2.6 to 1, to 3.1 to 1. In 1933–34 in white schools of the State of Virginia, there were 33.8 pupils per teacher. In 1957–58 there were 26.6 white pupils per teacher. In 1933–34 there were 41.3 black pupils per teacher, and in 1957–58, 28.2. In 1925–26 the ratio of school property values between white schools and Negro schools of Virginia was 9.4 to 1, whereas the ratio of white to Negro pupils was 2.6 to 1. In 1963–64 the ratio of white school property value to Negro school property value was 3.9 to 1, and the ratio of whites to Negro pupils was 3.1 to 1.

On the national level, housing segregation is the principal basis for school segregation. School segregation has likewise given rise in some circumstances to the growth of segregated housing patterns. Employment, education, and housing discrimination foster each other in the United States; the effects of one are causative of the others; they are interdependent phenomena.

On the basis of research which indicates that blacks in the Richmond metropolitan area have historically received an inferior education, Dr. Pettigrew, right in the court's opinion, viewed the social class effect here as directly, on the one hand, causing educational deprivation in current pupils and, on the other hand, being caused by past educational discrimination against their parents. Limitations imposed upon a parent perceived opportunities, especially employment opportunities, will affect the child's perception of his own opportunities and social status. Such long-term effects of discrimination are cumulative in nature, and continue from generation to generation, and will so continue in the Richmond area unless and until it is recognized that the benefits of the Constitution are not limited to a particular race.

It is the view of the Coleman report that the more important determinant of academic achievement is socioeconomic status; that is, economic class. But in the United States today race and class are correlated to a large degree, but not completely. The social class effect is of primary importance both in the individual achievement, as it relates to his social class, and in overall school achievement, as it relates to the social class predominant in a particular school. One of the desirable effects of the implementation of a metropolitan plan would be the opportunity for social class integration, as well as racial, but in Dr. Pettigrew's mind, and in the court's, the principal argument is that racial desegregation would be made possible.

Dr. Pettigrew is also an advocate of class desegregation. That is, he would prefer to incorporate in each school facility some from the lower economic echelons and some from the higher. He has been unable to determine the optimum mix in class-desegregation terms with anything like the precision he has been able to employ in the field of race. He believes that this is because class is not so salient a factor, not so observable, as race.

The beneficial effects upon attainment of racial integration, as compared with social class integration, are most strongly observable in the early grades.

ANTIMETROPOLITANISM

Based upon his learning as a social psychologist, Dr. Pettigrew stated, and the court accepts his view, that a major cause for urban school segregation today is antimetropolitanism, which tends to give rise to segregation across school district lines rather than intradistrict.

The Cincinnati report took to task school officials' lip service to the goal of desegregation:

> School administrators have declared that they favor nonsegregated education, but at the same time they continue to endorse the neighborhood school attendance arrangement. That is roughly equivalent to endorsing the idea of compensatory education but rejecting the notion of spending more on some students than others. In a city of Cincinnati's size, with its intense residential segregation, school desegregation would require significant and substantial modifications of existing school attendance patterns.

The report advocated positive efforts, at least on an experimental basis, to bring about desegregation on a continuous basis from the primary grades on.

> Second, the total student population of the subsystem should be economically and radically integrated, and should roughly reflect the city's population. The consequence of this would be that any given school, or all, in the subsystem could be between 25 to 40 percent Negro and/or disadvantaged and 60 to 75 percent white and/or advantaged.
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> * * * * *
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> If such a subsystem were established, and a serious effort made to provide improved quality education for all children involved, experience elsewhere suggests that whatever initial anxiety and questions there were would turn to acceptance and enthusiastic support.

The report recognized the profound impact upon blacks of school segregation:

> Segregation always has been the chief fact conditioning the educational situation of Negro Americans. Its impact has been profound, encompassing everything from the psychological to the political dimensions of schooling. Typically, it pervades public education systematically, affecting not only the patterns of pupil attendance, but also the character and the distribution of teachers and other educational resources to students. In Cincinnati, as elsewhere, racial segregation in the public schools is intense.

COMPENSATORY EDUCATION

Experience has shown that the goals served by an integrated school environment cannot be obtained through the use of such compensatory educational techniques as are available today.

Dr. Gross, an educator of much experience, did not say that he could not, as an educator, teach disadvantaged children in a school with a majority of black student population. He did say, however, that he could not teach them as much, and as well, as he could if they were in a racially integrated school.

As Dr. Gross said too, there is a very tenuous cause and effect relationship between a new building as opposed to an old one, or between the level of teachers' preparation on the one hand, and excellence in instruction. Teacher attitudes can be modified to an extent by training, but this is not a major determinant of their expectations. Whatever the training he receives, an instructor's attitude will be highly affected by the situation in which he operates.

The Cincinnati report which Dr. Hooker helped to prepare concluded that, "locally, the inequalities are metropolitan in scope and character, and any lasting solution will have to be cast in those dimensions." A very recent and well-evaluated remedial education program, the report stated, had turned out to have affected achievement very little. The report suggested other measures, based upon recent research indicating that the school environment is "salient for cognitative development." "There is very persuasive evidence that social class and racial desegregation is associated with higher achievement for Negro children."

The composition of the schools in the Richmond system is not likely to be stable as it is now administered. Nor will the white students in a racially isolated schools in the county systems be able to avail themselves of the benefits of an integrated education in any substantial numbers.

One of the necessary ingredients for "integration" in Dr. Pettigrew's terms is a degree of stability. Research tends to indicate that truly equal educational opportunity cannot be offered by schools which are desegregated only to resegregate. The transitional process is rarely productive. The effort to desegregate turns out to have been only a temporary gesture.

The phenomenon of white flight from schools over 40-percent black always occurs, when it does, in cases where there are other nearly white or all white schools in a community which provide a form of refuge. This is always true because there is no metropolitan area in the United States with more than 40-percent black population.

What declines in white achievement in majority-black schools are observable, in Dr. Pettigrew's view, are attributable both to the fact that such schools are likely to be in a process of transition and instability, and also to the related fact that such schools begin to be perceived as inferior. Instability, in other words, adversely affects educational success, but there is a separate negative impact attributable to perceptions of identifiably black schools in a community with identifiably white schools, as inferior facilities. Such perceptions induce some whites to depart, and they also diminish the chances of educational success in the black schools.

After the adoption of the current plan, plan 3, for the desegregation of the Richmond city schools, educational experts foresee that the black percentages in the city system will become larger at an even faster rate than heretofore. However, even if the Richmond system maintained its current racial distribution and did not continue to lose white students, educational consequences of the continued separation of the city system from those of the counties are bad. For even now the systems are identifiable as black and white, inferior and superior, with consequential harm to their students. Pupils in each school division would perceive the systems as segregated. The problem remains so long as disparity does.

In essence, there is no appropriate substitute for desegregated schools. Those that are not desegregated are simply not equal to those that are.

Dr. Hooker:

Dr. Clifford Hooker, called on behalf of the state and county defendants, is an expert in educational finance, reorganization and racial aspects of the latter problem. He did not consider himself, by his own judgment, to be an expert on school desegregation. His principal expertise is administrative and organizational.

Dr. Hooker confirmed that when consolidation of school districts occurs it is necessary to "level-up" the standards of each of the merged components so that the services, programs, pay schedules, and equipment of the combined system are equivalent to the best of any of the former systems. This witness, it appeared on cross-examination, in a recent study, gave his professional opinion that the correlation between school districts' size and the cost of education per pupil is not very high.

Given the size of the proposed combined school division, Hooker said that a decentralization plan of some sort would have to be utilized. Most witnesses agreed on this. Hooker feared, however, that this might impede racial and economic integration. A central authority, in addition, would necessarily remain. Therefore, he thought, regional administrators might serve only as conduits of local grievances, and the school principals would be subject to two sources of authority.

Dr. Hooker stressed the importance of a secure financial base for any school operation. Educators, he said, "are terribly sensitive about fluctuations in the support for the schools. Small changes in the amount of money available can result in fairly dramatic changes in the program because most of the school costs are in terms of personnel, you know, up to 80 percent in many school districts. These commitments are made by contract over long periods of time." (The Court notes the apparent conflict here with Dr. Campbell's testimony). Dr. Hooker was of the opinion that it would be extremely difficult for a combined system to operate, in reliance on three separate tax-levying agencies. Deadlocks, for example, might develop over the decision on where to locate a new school. It occurs to the Court that deadlocks may well develop, and have in Virginia between school boards and governing bodies in a single-county school division. If there is disagreement on the location of a new school, there is now no clear and simple way to resolve the problem. In Henrico, the board of supervisors might simply remove some or all of the school board members, but in Chesterfield and most other counties, the board has no such power. Yet somehow they manage and have decided to retain the system.

Dr. Hooker was not familiar with the practice in Virginia of operating joint schools financed by separate political subdivisions. Some of the other difficulties which Dr. Hooker described with respect to joint school operations might be alleviated in the Richmond metropolitan area plan by the existence of a single school board.

Conflicts over appropriations, he conceded, might well be much less heated if race were not a question.

Hooker said that, based upon his investigations, it appeared that each of the three constituent governments of the proposed merged system already was within the range of optimum school district sizes. He was quick to state, however, that optimum size may differ with the educational goals pursued. Still, in his opinion, each existing school division had the capacity to offer its students an intercultural experience.

Dr. Hooker recently wrote an article upon school district organization in which he stated that an overabundance of local school districts, gerrymandering of district lines, and the departure of affluent families to suburbs, together with faulty state aid distribution of formulas, have introduced "social, economical and racial stratifications as well as geographic separation." These are his current views. He is an active proponent of the reorganization of school districts, which he views as subject to modification by State authorities for valid educational ends.

Hooker's professional recommendation that a merger of the school divisions in the Richmond area not take place rests on very slim grounds. The weight of his objections is markedly undercut by recent expressions concerning the merits of school district consolidation in similar circumstances. He recently collaborated on a study of cooperation between school districts in the metropolitan area of Minneapolis-St. Paul. He observed that in the area economically disadvantaged individuals were increasingly concentrated in central cities, which themselves were growing more and more impoverished. Meantime, as the metropolitan area expanded the interdependence of old city and new suburbs increased. Seven points were made:

> 1. Suburban residents rely heavily on the economic reservoir which the city's employment opportunities provide.
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> 2. Suburban residents are strongly dependent upon the cultural and recreational attractions in the two central cities.
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> 3. Suburban residents rely upon the central cities to carry a substantial welfare load, the beneficiaries of which, in many cases, are the parents of suburban citizens.
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> 4. Suburban areas have become readily accessible to the cities as a result of massive freeway and urban transportation programs which have, to some degree, reduced urban tax potential by their extensive land usage demands.
>
> 5. Suburban communities, regardless of their emotional posture on the subject, have received enormous subsidization by the central cities during their periods of rapid growth as a result of differential revenue allocation programs, particularly in the form of State educational aid.

6. Urban areas are increasingly dependent upon the youthful vision, drive and leadership qualities of the suburban population.
7. Urban areas, because of the lure of suburban locations for commercial and industrial expansion, are in need of a fiscal partnership with the affluent and youthful families in the suburbs.

In Dr. Hooker's opinion these problems and interdependent relationships are found in most central cities.

The same article concludes:

> Will educators be capable of responding effectively to the challenges of metropolitan planning? What wisdom and social inventions will be used? Metropolitan areas throughout the country are seething with unrest and disquiet to which inadequate and inappropriate education efforts are alleged to have contributed. Islands of educational and economic affluence exist in a sea of poverty and ignorance. There is no single solution to this problem. A variety of approaches will be needed. Many of the "sacred cows" in education will need to be eliminated or at least modified. Neighborhood schools, local control, and local school districts should be retained or rejected on the basis of their capacity to deal with metropolitan problems rather than for their sentimental value. The application of cooperative research and development approaches seems to hold promise as a means of managing changes of this magnitude.
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> A revision of the statutes controlling education is needed in most States. Just as permissive legislation never achieved effective school district enlargement in rural areas, metropolitan planning for education will never achieve its objectives until the State covers some of the authority which it has delegated to local boards of education. The State may choose to transfer some essential functions, such as planning and financing of education, to a "super-board," or it may elect to establish a single metropolitan board of education. While these options may lack appeal to many educators, the alternative of continuing existing school districts with their individual incapabilities for solving educational problems of metropolitan areas cannot be defended. The probability of legislative and judicial review of public school operations in metropolitan areas increases in proportion to the inability and unwillingness of educators and boards of education to attack problems cooperatively. An illustration of what could happen was provided by Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia. While delivering the sixth annual James Madison lecture at New York Law School, he observed that the Supreme Court might require that city and suburban school districts merge their operations to achieve racial balance.

Dr. Hooker did agree, too, that the preparation of children to live and work in a multiracial society is a valid current educational goal. He conceded the findings of the Coleman report as to the improved performance of black children in other than all black facilities. He thought—though he was uncertain—that the explanation lay in class differences: where black children are in the minority in a school, they tend to be middle class, given the Nation's housing patterns; but he admitted that the Coleman report, in determining that educational performance varies greatly with socioeconomic status, suffers from a defect common to the regression analysis technique, when used in an effort to separate the effect of variables which in fact covary with each other. He was quick to agree that this factor covaried with race very strongly in most circumstances.

Dr. Hooker admitted that it was bad as well for white children in Henrico County to know that they attend a white school, and that because of jurisdictional boundaries black children are being kept in the city of Richmond.

He conceded that a child, observing two schools on different sides of a jurisdictional boundary, with widely disparate racial compositions, would not be sufficiently sophisticated to know most of the forces and factors which brought forth such racial composition, but would simply perceive the existence of black and white schools.

However, school organization is a matter of compromises, he said. Goals may conflict. Pure feasibility in some areas limits the attainment of complete desegregation. He would not say that this was the case in the Richmond metropolitan area. He thought that it might well be administratively and economically feasible to resolve the admittedly bad situation of racially identifiable schools by having the jurisdictions remain, for school administration purposes, separate and intact, but initiate an exchange of pupils on some tuition contract basis. That system, Hooker said, had the fault that parent would be sending their children to be taught by a system over which they had no control. This is the same phenomonen which prevailed under the tuition grant system. It also prevails now in other areas of Virginia where children from one political subdivision are educated in another under contract.

Despite his recognition of the demonstrated benefits of integrated education, Dr. Hooker, based on limited expertise, had the idea that the redistribution of pupils in the Richmond metropolitan area, based upon the overall community racial ratio, would appear insulting and paternalistic to the black pupils and their teachers and would diminish their achievement. The overwhelming weight of the informed testimony is to the contrary.

In fact in the survey he conducted of the St. Louis area, Hooker recommended the combination of an all-black school district with 2,000 pupils, with two white districts. The total population of the resulting district was 22,000. Blacks, therefore, were in the small minority, but Hooker denied that such a plan was racist. The court accepts his testimony on that point. Still he suggested that the metropolitan plan, by suggesting that blacks must be in the minority in order to have a good education, is a racist proposal. In this, the court believes, that he misconstrues the premises of the plaintiffs' case. Experts testifying in support of the proposal stated that whatever the black racial proportion in the metropolitan area, they would still advocate a redistribution according to rough parity. In fairness, Dr. Hooker conceded this point.

Dr. Hooker also supported those measures taken to date in an effort to desegregate schools within the bounds of the city. Educationally speaking, from the information he had, he said, it had probably been a sound decision to desegregate 19 all-black or all-white schools during the current session in the city of Richmond by means of crosstown transportation, entailing distances of 6 to 8 or 9 miles, of about 7,500 students.

In Hooker's opinion, expressed in this court, a public school is desegregated when it excludes no one because of race. He would not add the requirement that it in fact have a biracial student body. Under his definition, he said, the schools in Richmond currently are desegregated. Such restrictions as exist upon access to schools with a different racial mix, to Hooker, are only those which necessarily ensue when some form of assignment plan is employed.

Hooker said that he might be much more willing than he was to term the area school community segregated were there some indication that the existing jurisdictional lines were imposed with the intention of separating black children from white.

He acknowledged the contributing factor to the problem of inadequate education was the failure of suburban areas to participate in programs to make available to lower income groups housing sites outside the central city.

Hooker conceded that segregation in his terms might exist if school authorities had "failed to take affirmative action with respect to additions to schools or the modification of attendance areas to obtain or maintain some reasonable balance." Segregation might also occur, he said, if a board fails to use the pupil assignment power enjoyed by it to dismantle a dual system. Hooker stated further that the development of dual systems with schools located to accommodate population groups on a separate basis would quite foreseeably produce segregation, although formal racial legal barriers were lifted.

A history of continued resistance to desegregation, including school closings, central administration of pupil placement, tuition grants, and general State interference with any effort to desegregate, was also highly relevant to Hooker as an educator in determining whether a particular pattern of school assignment was segregated in his terms.

Nonetheless, he maintained that the pending proposal to be a "racist" plan. This exchange ensued:

> Q. You think that black plaintiffs who have alleged in this case that they have been artificially confined in the city limits of Richmond, that they have been confined to segregated schools, that they have been confined to this community within the city of Richmond because of deprivations in economic opportunity, educational opportunity, and a whole structure of segregated society in Richmond, in Henrico, and Chesterfield and the State of Virginia by State constitution until commanded by acts of the legislature; do you think that it is paternalistic for blacks now to seek schools, just schools, that reflect the distribution of blacks and whites or proportions of blacks and whites in this area?
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> A. If I were certain of the condition that you established, I would obviously answer the question "No," but I don't accept a lot of assumptions that you built into your question.

Sad to say, the assumptions stated by counsel in the question have been proven to be accurate.

Had the doctor's studies of conditions in the area and their historical origins—factors he thought relevant—been somewhat deeper, he would have acquired sufficient knowledge to support the stated assumptions. It should be remembered, however, that his expertise excluded school desegregation. His preparation was to the finance, administration, organization—including organization and reorganization, of multiracial school districts.

Hooker thought that the consolidation of schools in the Richmond area would in some way "disenfranchise" black residents by preventing them from achieving control of the system. He conceded that some of the expressed desire for black control of school systems may represent a reaction something like frustration to the failure of those in control to achieve long promised equal education opportunity. He felt that such rhetoric represented a disparity "on the part of people who have fought for a long time and have been denied total access to this culture and this economy." While the court is in accord with his view on the referred to rhetoric, the court disagrees with his conclusion that black residents would be in some way disenfranchised. In any event, any such fear will be dissipated in a much shorter period of time than that period of time which has given rise to any such supposition, once blacks receive that which our Constitution says is the due of all citizens.

Hooker thought that decentralization might tend to conflict with goals of integration because in most cases it results in the division of the larger jurisdiction into homogeneous areas. If the Richmond metropolitan plan were utilized. Hooker would recommend that subdistrict areas be drawn to include a heterogeneous population.

Dr. Hooker agreed that, generally speaking, black and white schoolchildren are reasonably close together in achievement levels when they begin school. As they progress, however, differentials appear and increase.

Hooker acknowledged that the Lorge-Thorndike ability tests generally measured the same things as do scholastic achievement tests. They do not measure innate ability and in fact have some cultural bias built in them as well.

He stressed the contribution to educational progress made by parental influence.

Dr. Hooker felt that where hostility or fears with regard to race existed, as a practical matter, that a school administrator was not free to desegregate his schools.

In substance Dr. Hooker's objections to the metropolitan plan were reached on the basis of less than a full appreciation that this was a desegregation suit with its gensis rooted in purposeful discrimination, coupled with what he perceived to be possible problems pertaining to securing some degree of agreement on the various aspects of school operation. Not the least of his concerns was financing. In view of the current state of the law, and Virginia's permissible methods of handling the financial aspects of a consolidation of school divisions, the court finds his objections insofar as they go to the merits of this suit and the proposed plan to be unpersuasive.

Dr. McLure:

Another defense expert on educational administration, organization and financing, Dr. William McLure, gave his judgment as to the merits of the metropolitan plan. His principal work in recent years has been to conduct statewide educational studies.

McLure found no educational advantages to a metropolitan plan. He found disadvantages in that, as he said, the plan was too rigid and mechanical in reshuffling pupils and resources. Administration, he said, would become more complex and expensive and less responsive. He feared that merger would do away with school communities of sufficiently small size that pupils would be able to identify with them. Perhaps most vehemently Dr. McLure objected to what he termed the creation of an "arbitrary, dehumanizing racial mix," unpromising of constructive racial integration. McLure feared that in the larger system children would become disoriented and educational policies would tend toward uniformity. Likewise, he foresaw a loss of public support as citizens became isolated from those governing the merged system.

The court has considered McLure's testimony in light of the fact that he was offered as an expert in administrative and financial matters rather than in the sphere of social science or educational psychology. Dr. McLure gave as one of the roles of public education the perpetuation of society's values. He would not count segregation as one of those values to be fostered; but when asked whether he thought affirmative action by public educators should be taken to eliminate segregation as a social value, Dr. McLure said that he thought the issue had been settled. He was not aware that schools in this area had been very recently operated on a strictly separate basis.

In his testimony, McLure set forth various educational goals which he thought might be promoted by consolidation of public schools. In publications concerning alterations of other sorts in educational structure McLure has listed similar factors as educational desirables. One factor from an earlier article, however, was left out of the testimony: Integration of cultural groups.

On cross-examination he agreed that integration was a necessary goal. In many areas, McLure showed himself to be conscious of the need for school districts to be constantly improving by developing new education techniques to fit changing social patterns and meet new economic needs. He saw the creation of regional educational centers and other techniques of cooperation between school districts as examples of modern advancements. Fourteen years ago he recommended the reorganization of intermediate school districts, recognizing that the initiative in this had to come from the central State government. In such a restructuring, political subdivision lines would be given, he then said, "secondary importance." In this case he stated that school division boundaries served no educational purpose.

Dr. McLure conceded the value, as an educational goal, of preparing young citizens to live in a multiracial society and acknowledged that improvement of educational climate is a possible goal of school division consolidation. Further, he agreed that the optimum educational climate would not be obtained if a district boundary line separated the schools that were, on the one side, nearly all white, and on the other side, nearly all black. He said that there might be some way to optimize the climate in each school, but he did not elaborate. He made the same statement concerning school systems with such differential enrollments. These conclusions were, in the court's opinion, inadequately based in research.

Dr. McLure thought that pupils transported out of their home neighborhoods would lose peer contact and become disoriented. The child's relation with his peers he linked to his identification with a particular school community. McLure's objections, however, would be greatly reduced if children were taken in groups with their peers, to the school to which they were assigned. He conceded that a strictly "community" or "neighborhood" assignment policy would result in a great number of segregated schools.

McLure said that the Richmond metropolitan area plan created an "arbitrary" racial distribution. He conceded, however, that the ratio of black to white throughout the metropolitan area was not itself arbitrary, but rather an established fact. He seemed, nonetheless, to be under the impression that the purpose of the plan was to impose exactly that ratio in each school. In fact, the overall ratio is used merely to establish general upper and lower limits on racial distribution in each facility. Even the 20- to 40-percent black and 60- to 80-percent white guidelines is violated in certain instances. Nevertheless, McLure would have preferred to leave school racial composition to natural forces of population distribution. He was not aware to what extent discrimination has affected those patterns in the Richmond metropolitan area.

Although he considered integration to be a desirable educational goal, McLure thought that continuing interracial contact was not crucial, and that the same benefits might be gained in other ways. He was unable to suggest any, except to say that he saw good prospects for meaningful integration in a school housing 800 whites and two black students.

Although Dr. McLure objected to merger on grounds of cost, he had no information on the amount of money the State might have spent since the *Brown* decisions in promoting segregation by means of tuition grants, regional segregated schools, or legal defense of segregation.

Dr. Whitlock:

Dr. James Whitlock was offered by defendants as an expert in educational administration, organization, and finance. In the past he had done studies of the administration of the two county school systems and performed a fiscal analysis of Richmond city schools.

Generally, Dr. Whitlock said, consolidation of school systems seeks to achieve better quality education by increasing financial resources and making achievable economies of scale. Administrators seek to take advantage of supporting services possible only with a certain minimum size, to make better use of staff skills, and to, in general, provide the optimum educational climate for children.

At the same time, in consolidation, Dr. Whitlock stressed the need to maintain the strong components of the merged units. Because of the leveling up required when three systems with varying levels of services are combined, Whitlock predicted a rise in overall expenses. He saw no significant savings, on balance. Whitlock foresaw the decentralization program as requiring some additional staff people. His own research led him to the conclusion that a school division of 20,000 to 50,000 pupils is optimum.

Whitlock objected to the proposed metropolitan plan here principally because the existence of a single school board and administration, answerable to three fiscal sources, would make financing too uncertain, he thought, and the revenue-raising bodies, boards of supervisors, and city council, would not be answerable to all of the people they served. Whitlock foresaw constant differences between the three components, with consequent impact upon citizens' willingness to tax themselves. Despite the region's good record for tax effort, it was Whitlock's opinion that bond issues subject to referendum would be unlikely to pass.

He conceded that his arguments against merger in this case would not come to much if the proposal included a continuation of tax bases. The comparison of costs and tangible benefits, to him was the essence of his approach to evaluating the merits of a merger. He admitted too, however, that certain educational benefits are not subject to this method of evaluation.

He thought that it was essential to provide a single consolidated school board, as Virginia law now does. Overall, he would prefer that school boards be empowered themselves to levy taxes; this, however, is not the governmental structure that the Commonwealth has embraced for many years.

Whitlock was not aware that any expert had recommended consolidation plans which entailed relying on separate tax bases. It immediately occurs to the court that any form of joint school operation, which has been practiced in the State of Virginia for a long time now, is exactly that. In several areas, in fact, a joint high school has constituted a consolidated secondary school system for blacks, in effect. Moreover, when schools are divided by one political subdivision for pupils from another by contract, the first is dependent upon two fiscal sources for support. Both of these modes of organization have been recommended by the State board of education in the past.

He anticipated that Henrico and Chesterfield would require $100 million in bond issues over the next 10 years for schools.

Whitlock conceded as well that patrons in each political subdivision would have a common interest in securing cooperation between the three governing bodies to provide financial support. At base, Whitlock's concerns appeared to focus upon the "taxpayers' revolt" against school expenditures which he observed in other areas. Whatever may have happened in other jurisdictions, however, it is undeniable that citizen support for education in the Richmond metropolitan area has been strong and continuing.

It was Whitlock's judgment that there were no educational advantages to be drawn from the metropolitan plan, aside from that of achieving desegregation, a subject upon which he admittedly had no expertise.

It appeared on cross examination that this witness had given his endorsement in the past to detailed recommendations of school district consolidation in a report which relied in substantial part on the increased feasibility of desegregating schools on a metropolitan basis. This was the product of a detailed examination of Raleigh and Wake County, N.C. schools. The foreword to the report gives as one premise that "adequate opportunity for all children and youth means that it should not make too much difference where they live. In Raleigh and Wake County it does make a difference—too much of a difference as the evidence shows."

In the report this witness was not so pessimistic as he seemed in court as to the possibility of some economies of scale in an enlarged school district. These were Whitlock's words:

> It has been commonly accepted for some time that economies of scale exist in education, and it seems reasonable to expect that larger districts would bring with them the greater efficiency due primarily to the advantages of purchasing, and the more efficient utilization of personnel, school facilities, and other resources. Research, by and large, seems to substantiate the existence of such economies.
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> The existence of the boundary line between county and the city school districts presents a serious deterrent to sound school facilities planning. Because of the ever-present possibility of annexation, school plants in the county often are not located in proper relationship to the population that they serve. Distribution of tax revenues for capital outlay and proceeds of bond issues on a basis other than need encourages uneconomical practices in capital outlay expenditures. The merger of the school districts would make possible the more efficient utilization of buidings, transportation equipment, data processing facilities, and both certificated and noncertificated staff personnel.

The report also indicated that new industrial development in the area would depend greatly upon the existence of a well-educated labor supply. Unified educational planning would assist in attaining that end. Moreover, the expanded school system recommended it could more economically provide vocational and technical educational facilities.

The report in other sections took note of the 40-percent increase in Raleigh's nonwhite population between 1940 and 1960. During the same period, the county population of whites increased nearly four times faster than the nonwhite population did. "The implications of these phenomena for changes in the prevailing school organization should be of concern to the Wake community as well as its two school systems."

With changing population trends, the Raleigh-Wake County report noted, blacks are increasingly housed in "subcommunities," particularly in the city, of compact size and dense population.

Dr. Whitlock conceded that if phenomena of this nature were present in the Richmond metropolitan area as well, the findings and recommendations of the Raleigh-Wake County report might well be relevant here. He registered no dissent from the conclusions of the report when it was published.

The court finds it somewhat surprising that this witness did not search for similar factors, so important to the earlier study, in his several examinations of the Richmond area. Had he looked, he would have found them.

The report also gave great weight, to the exclusion of certain negative factors, to the assistance in desegregation afforded by an expansion of the jurisdiction.

The report based its recommendation of consolidation in part on the finding that "a single school system would make it easier to meet racial integrational requirements in the schools. Virtually all school desegregation in both the city and county systems has occurred in the predominantly white schools." "School planning within a single district and coordinated with general community planning could result in a superior capability for desegregating schools."

The Wake County report relied in part upon the common interests between the city and the county, and the city's position as a source of cultural and economic opportunity for citizens of both communities. Although the merged system would have a pupil population of about 48,000 students, near the maximum of Dr. Whitlock's estimate of optimum school district size, and, significantly, no decentralization proposal was discussed, the consultants endorsed the view that "bigness" should not "impede the value to be derived from merger even though such a merger will produce large school districts." They noted that the average school bus route one way was below 17 miles, which they found reasonable by educational standards. At the same time, and concurrent with merger, the consultants recommended certain modifications in the State aid program, which they called upon central authorities to make.

Emphasis in the report was laid on the practical value to residents of one political subdivision of guaranteeing adequate education for all persons in the metropolitan area.

> Whether Raleigh school district citizens should be willing to pay more taxes to improve the level of educational opportunity for Wake County school district pupils is not solely a philosophical question. It has certain practical considerations. Philosophically one could argue that county school district children deserve the same educational opportunities as city children, and vice versa. . . . Education opportunities for children and youth should not be dependent on where they happen to reside within Wake County. Then, practically, Wake County and Raleigh comprise a unified social, economic, and cultural area. The concern of Raleigh citizens for the education of Wake County children and the concern of Wake County citizens for the education of Raleigh children should be a very practical one.

Some of the "leveling-up" costs which Whitlock foresaw would be incurred in any event. For example, Henrico County will be required to adopt a kindergarten program in a few years by the State board of education whether it is a part of a metropolitan system or not.

This witness, while asserting an opposition to the suggested merger, did so without a sufficient recognition that the instant suit is a desegregation action and, in the court's opinion, without a valid basis for his assumptions that the necessary revenues would not be forthcoming.

Undoubtedly the people of the respective counties may well be opposed to any merger of the school systems, but there is no credible evidence to base any assumption that they would do or fail to do anything which would adversely affect the quality of education to be accorded the children of the communities involved.

Dr. Lucas:

Robert E. Lucas, superintendent of the Princeton City School District, Cincinnatti, Ohio, testified to the success with which he is currently operating a school district formed by means of a consolidation imposed without the consent of the population of any of the constituent parts. The Princeton district was formed originally in 1955, by the forced consolidation of eight smaller districts. Recently it underwent a second enlargement when it was merged with a neighboring all-black school district to form a unit comprising about 30 percent black and 70 percent white pupils. Concurrently with that merger, Lucas and his staff have undertaken to desegregate all the schools in the combined system. The all-black school district was very poor; 40 percent of its population was on welfare. It had a high crime rate and was surrounded by mostly white, wealthy school districts. It suffered from insufficient funding and an overall lack of educational attainment. The merger was directed in early 1970 by the Ohio State Board of Education, which was itself partially motivated by pressure from the Department of Justice to bring about desegregation.

Initially, citizens of the Princeton district were greatly upset. There was absolutely no public support for the merger. He described it as a time of "excitement, threats, and all sorts of things"; including threats on his life. Lucas sought to implement the transition by appointing an advisory council composed of citizens of each unit. He advised the teachers under him that he hoped that they would undertake the challenge with him, but that if they had no sympathy for the desegregation process, they should seek other positions.

Very few staff members left (three out of 600), and the advisory council, after several stormy sessions, proceeded to negotiate compromise arrangements for the dovetailing of the two school structures, including athletic and extracurricular activities. Staffs for each school were desegregated, and inservice workshops were set up for teachers and other school employees.

In the meantime, Lucas sought to muster public support for the move by disseminating information releases stating firmly of his intention to maintain quality in instruction. He had a series of open meetings, and also met with business and political leaders of the communities affected. He set up a speakers' bureau and even a "hotline" telephone to deal with rumors. He enlisted the support of ministers.

The result, Lucas said, was "the most excitement in education" he had ever seen. The programs of his former district, 90 percent white, have not been damaged. White students are doing as well as they did before, and the achievement of blacks has been raised. Community relations have been improved, and the teaching staff has been stimulated.

There has been no loss of white students from the district, although the opportunity exists for many to move out. Black students have done better. In the former Princeton system, which had about 12-percent black enrollment, there had been little interaction between the races. The 10- to 12-percent black component in the high school went nearly unnoticed. With the current 30-percent black ratio, there is a much greater chance for communication.

Community use of the school district buildings for nonschool activities has not diminished. In fact, it has increased.

To an even greater extent than the school divisions here involved, the Princeton school district is dependent upon voter approval for financial support. Not only capital but also most operating funds are subjected to referendum. One such operational levy has been put before the voters since the merger, and it passed by a 57-percent margin, a larger vote margin than has carried any of the last four.

The Princeton district has a transportation program employing about 80 buses; the average bus trip is about 30 minutes.

The area of the district is about 36 square miles, and has about 11,000 students.

Based on his experience, Dr. Lucas said that a pupil population of about 10,000 is the minimum size for an efficient school district. Above that number, size is not really important to the education of the individual.

Lucas had not advocated the merger. As a subordinate official in the State educational system, he was constrained by political considerations from recommending a consolidation, although he had recognized for some 15 years previously the advantages of consolidation. The current Princeton district is about 12 miles distant from downtown Cincinnati and 2 miles away from the Cincinnati city border. Based upon his experience as an educator and an administrator, Lucas gave the opinion that there never would be quality education in the metropolitan area of Cincinnati unless desegregation were brought about there on a broader basis than is currently the case. To attain this objective, he said, he would willingly sacrifice his own position.

While the area and school population which was the specific subject of Dr. Lucas' testimony was much smaller than the one here involved, the evidence adduced lends weight to the Court's ultimate conclusion that a merger of the school divisions here involved is both required and feasible.

PERCEPTIONS AND INFERIOR EDUCATION

Dr. Thomas Pettigrew is a long-time student of social psychology and, in particular, on the impact of perceptions of race upon education. He assisted in the preparation of the Coleman report, "Equal Education Opportunity," and that of the 1967 study, "Racial Isolation in the Public Schools." The Coleman report, a watereshed study in social science, is based upon a survey of over 60,000 public school children taken in late 1965. Subsequent studies have demonstrated certain inadequacies in the manner in which data was compiled and analyzed, but regardless, the report is a landmark in social science, a document the conclusions of which must be considered by any student in the area. Pettigrew based his opinion on these reports and other studies.

Calvin Gross is an educational administrator with experience in operating school systems of widely varying sizes. He has been superintendent of schools, in Weston, Mass., a 1,000 pupil system; in Pittsburgh with 70,000 students; and in New York City with over a million. His educational experience includes the teaching of racial minorities in large cities and the use of assorted techniques to increase their achievement level.

Dr. Robert L. Green is a professor of educational psychology at Michigan State University and is director there of the Center for Urban Affairs. He has published numerous articles and papers on race and education and participated in one particularly significant empirical study made for the U.S. Office of Education, that of the educational status of school children in Prince Edward County, Va., from 1963 through 1966. For the 5 previous years public schools were not operated in that county.

Lochran C. Nixon, Jr., is executive director of the Midcontinent Educational Development Laboratory. He is experienced in the development of instructional programs for pupils and teachers in urban schools. He has served as an area school superintendent and director of secondary education in Florida schools and as assistant director of a survey of public education in Alabama.

Benjamin E. Carmichael, currently director of the Appalachia Educational Laboratory, has been a student of the problems of school segregation for nearly 20 years. In the years before *Brown* he participated in a study, for publication, of the dual school system. He was superintendent of schools in Chattanooga for 6 years, while that system began to dismantal the dual schools, and also served on the advisory committees directing the preparation of the Coleman report and racial isolation. He testified on the basis of his experience in organizing and administering school systems and from extensive personal contact with black and white school children.

Like other educators, Carmichael saw as one of the responsibilities of a school system the development of attitudes and aspirations which equip the individual to fulfill his desires, to act as a responsible citizen, and to carry on the values of his society. The properly educated person should be able to function without restrant with a sense of having control over his own life, and to deal with his environment from a posture of self-confidence and self-reliance. It is the duty of a school system to develop both the academic and the attitudinal sides of its class, its pupils.

Focusing upon the question of racial integration, Dr. Carmichael stated that his idea of quality education would be attained only if the school environment were such that each individual was not made conscious that restrictions were imposed upon him and his aspirations on the basis of race. Nor should artificial notions of advantage, traceable to race, be inculcated.

In a racially identifiable school; that is, one which does not in its enrollment roughly equal the racial proportions of the community as a whole, the minority student would sense that he is not expected to achieve much. If he is moved to a racially nonidentifiable school, factors which repress and inhibit his self-development are removed, and "he can seek his own level," as Dr. Gross put it.

Crucial to attitudinal and academic achievement, and much affected by the racial ratio within a particular school, is the individual student's perception of himself. Self-perception is affected by a pupil's notion of how he is being dealt with by the persons in power. Adverse impressions are not greatly affected by political or historical explanations for the origins of segregation. The negative impact of segregation is not dissipated by the explanation that the cause lies in the placement of school division lines.

As Dr. Gross put it, "segregation of schoolchildren does two things. In the minority group children it creates spurious feelings of inadequacy or inferiority. In the majority group children it creates equally spurious feelings of superiority or inflated personal worth." Such a situation, he said, is equally harmful to black and white children. In terms of these harmful effects, Dr. Gross viewed the Richmond school community as one containing racially segregated schools.

Education in segregated schools impinges strongly on the development of white children as well as black. Deprived of contact with minority groups, whites tend to develop unrealistic self-perceptions, as several of the experts noted.

School segregation, even when brought about by the manipulation of attendance boundary lines, has a very negative impact upon self-perceptions, and consequently development, of black children. This flows to a great extent from children's awareness that they are contained on account of race within a particular area and school facility. It affects motivation and, therefore, achievement. The sense of containment, of being confined by a hostile majority, imposes a sense of limited possibilities and decreases ambition. As Dr. Green put it, "one soon develops the impression that no matter how hard you work in life your ability to move freely in American life is yet controlled by the dominant community in a very negative manner and I think segregated school systems highlight this very significantly."

Students' attitudes are picked up from fellow pupils and from teachers and administrators in their schools. When, in the course of desegregation, for example, black administrators are demoted, children readily understand it as an act of discrimination.

The Cincinnatti report, on which some defense experts collaborated, recognized that the teachers' conceptions of the schools in which they hold classes are affected by the racial and economic status of their schools. There is a "much stronger tendency toward a negative view of school and students in the mostly black and deprived schools than in the mostly white and advantaged schools." The report found as well that racial composition varies closely with achievement status of particular schools.

Social scientists generally agree that one of the most important features of equal education for black and white children alike is the effective integration of schools, for which desegregation is a prerequisite. No paternalism is implied in this judgment, at least no more than is usual in any statement about the best manner to prepare young children for life. For the question in 1971 is not whether seperate schools might provide inadequate education in a nation without a history of discrimination, but rather where, as here, given the repressive policies of the past whereby deliberate isolation was achieved and accepting that the enduring effects of such policies are not wiped out by the simple act of legislation or judicial decision, students of either race can be prepared to participate in the public and private life of a multiracial society if their education proceeds in isolation.

As an educator, Dr. Carmichael could only approach the Richmond school system as it exists today in terms of those historical factors which led to the present situation. He spoke of the context of past discrimination. In this environment, to Dr. Carmichael, and as the court finds, the black child in a racially identifiable school will continue to feel that he is a victim of discrimination and has been labeled inferior. Whites in the surrounding counties, under present arrangements, would continue to "live the lie" by being taught an artificial sense of superiority. Neither result is consistent with the kind of attitudinal development that is an educator's responsibility. Educators, quite simply, perceive the current situation as involving two white systems and one black.

Dr. Pettigrew stated, and the court finds, that the educational harm to children from the racially separated schools in the area involved herein, is to the black child similar if not identical to the harm incurred prior to the *Brown* decision of 1954. Indeed the calculable harm to children about which the court spoke in *Brown* may now have the additional negative component of perception by blacks that the law has spoken and the situation is the same.

When the schools were closed in Prince Edward County, Va., black parents of children shut out of public facilities were forced to send their children to such distant places as Michigan, Florida, and the District of Columbia for an education. The Prince Edward school closing had long-enduring effects on the attitudes of blacks throughout the State of Virginia. As Dr. Green testified,

> It has a very long range, again a very long range, unhealthy and negative impact upon the perception that individuals have about the control they can in some way direct toward their lives. And when the State, any State, takes official action, official action toward a given minority group which is highly related to the whole concept of containment, the community does not forget that for a very long period of time.
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> We can make a distinction between a small body of individuals using their power to oppress people, but when a State takes official action directed toward a particular minority group in order to contain, manage and oppress that group, educationally, politically, socially—it has a long range and very unfortunate impact upon self.

Dr. Campbell of Henrico stated that, in his opinion as an educator, the best education can be afforded children if administrators try to "develop the finest program possible and do all you can for those children in that neighborhood." He would do nothing to change the racial characteristics of adjacent schools, one with a 65- to 75-percent black enrollment, and the other with 3- to 4-percent black pupils. Taken purely as an educator's expert opinion, and divorced from legal requirements, the court finds this judgment to be so at variance with current opinions as to the components of quality education, and so completely unsupported by empirical data, as to be unworthy of serious consideration.

Academic development is closely related to attitudinal development. Particularly does the individual's development of a healthy attitude toward himself tend to bolster academic achievement. As Dr. Pettigrew said, "It is really one ball of wax and we are pulling out parts of it for analysis, but we should never forget that it is one ball of wax." Dr. Carmichael also stressed the fact that it is impossible to develop fully the academic skills of an individual without first modifying his attitudes of self-perception. Dr. Nixon also supported the proposition that the affective and cognitive development of a child are interrelated and interdependent.

Generally, white students in all white schools and in the majority white schools achieve at approximately the same level, when one eliminates the factor of socioeconomic status. There is very little reliable data on the performance of whites in majority-black schools, which one can use to make a comparison with those in the other two situations. What data there is seems to indicate that their achievement is lower in such situations.

Black students' achievement levels seem to follow roughly those of white; it rises significantly as one examines performance in majority-white schools, as compared with that in majority-black schools.

Generally speaking, black and white children enter school at about the same level, as measured by achievement tests. Thereafter, black academic achievement declines over time in segregated systems.

The social psychology of the Richmond area is such that schools with black enrollments substantially disproportionate from the racial composition of the area will be perceived by the community as bearing a stigma of inferiority. Black pupils of such schools will achieve less by reason of such perceptions by the community at large, their teachers, their parents and themselves. Perceptions affect expectations, and the expectations of such persons have a notable impact upon the achievement of individual students.

In terms of the accepted educational goal of equipping each student, both in the academic and the affective spheres, to develop his maximum potential, the operation of the three school divisions as they are now run will not be a success. This is traceable to the racial identifiability of the three systems. Dr. Nixon, as an educator, would recommend the metropolitan plan or something similar to it as a solution to such deprivation.

The effect of various assignment plans on the child's perceptions must be judged in terms of existing alternatives. If a metropolitan proposal is not implemented, black children in the city of Richmond will attend black schools in the foreseeable future.

Currently observed differences in achievement levels between students in Richmond and the counties are entirely consistent with observed effects of segregation in other areas.

In 1960, in the city of Richmond, the median education level was 10.1 years. In 1950, it was 9.9 years. This figure was lower than comparable levels for standard metropolitan statistical areas in the southern region. In 1960, the median education level in the surrounding counties was 12.2 years. "This level was the highest of the State's SMSA's higher than the USSMA median, higher than the medial level in the southern SMSA's, and most importantly, was 2.1 years higher than the city of Richmond."

Superintendent Adams stated that he did not believe, under the current school divisional arrangement, that Richmond pupils' academic achievement could be brought up to grade level, and the court finds the greater weight of the evidence to support this conclusion.

The housing of a great majority of the black children in the metropolitan area within boundaries which place them in 70 percent or more black schools, at a time when 90 percent white schools are operated just across the line, has the same impact upon self-perception and consequent effect upon academic achievement as that of official segregation as it existed in 1954.

The children of the three areas involved cannot, under existing conditions and as the school divisions are now operated, receive an equal education.

Dr. Carmichael was hopeful that educators would not become wedded to any particular system of school organization so that they were unable to alter existing forms to attain valid educational objectives. He considered the alternative of the metropolitan plan to be a sound and feasible approach administratively; that it would contain 107,000 pupils did not concern him. Indeed, he, Little, Nixon and others thought its size beneficial in that it might make possible student services, such as an adequate system to evaluate educational performance, not attainable now by the separate systems.

Housing

Statistical surveys of the Richmond area demonstrate that residential segregation, both in the city and the area comprising Richmond, Henrico, and Chesterfield, is intense and increasing.

Karl E. Taeuber, a sociology professor for the University of Wisconsin, studied U.S. census data as to racial occupancy by city block and census tract in the area. He expressed his findings numerically, in terms of indices of dissimilarity. These figures give an objective measurement, for purposes of comparison, of the distribution of two classes of persons over space. Under this system, the higher the number, approaching 100, the greater the deviation from a totally random distribution of the two types of persons. Complete segregation receives a score of 100.

Dr. Taeuber applied his system both to census tracts and to city blocks, when the latter data was available. To calculate using blocks gives a finer measure of the degree of segregation, because census tracts are larger, containing 4,000 to 5,000 persons, and may contain within their bounds patterns of segregation not disclosed by an examination of overall racial proportions. Block data for the 1970 census, however, was not available to Dr. Taeuber.

Taeuber's technique avoids subjectively and gives a convenient tool for longitudinal study.

Taeuber has studied more than 200 cities across the country, and in each one has found pronounced and pervasive racial segregation. Most ethnic groups other than blacks, groups determined by national ancestry, are segregated in housing in the range of from 50 to about 30. Segregation corresponding to differences in income groups ranges, in the United States, up to an index of about 28 or 29. A study of the city of Richmond, as it was in 1960, reveals that very little, 15 percent in Dr. Taeuber's view, of the residential segregation he found between blacks and whites, is traceable to the fact that blacks generally seek lower cost housing (I-14).

Dr. Taeuber also studied, as a sociologist, the factor of choice and its influence upon racial housing segregation. It is difficult to apply this factor within an objective framework, he said; nevertheless, his studies revealed, and the Court finds, that generally the large majority of blacks state a preference for living in integrated neighborhoods.

Analyizng distribution by census tracts, the index of residential segregation in the city of Richmond in 1970 was 82.1. This is an increase from 1960, when it was 79.3 (PX 131).

Dr. Taeuber explained that this conclusion, in lay terms, means that, in order to achieve random distribution of residents, in 1970, it would be necessary to move 82 percent of black residents out of the census tracts in which blacks are overrepresented. Or one could move 82 percent of the whites out of the census tracts in which they are overrepresented, in order to achieve random distribution.

An analysis on the basis of city blacks gives a 1960 measure of residential segregation in the city of 94.8. This is an increase from the 1950 figure of 92.2.

In 1970 the index of dissimilarity based on census tracts showing residential segregation in the combined area of Richmond, Henrico, and Chesterfield is 79.7, an increase over the 1960 figure of 76.1.

These figures depart sharply from the index of perhaps 28 or 29 that can be attributed to differences in income levels, or, more precisely, the amount paid for housing. Clearly, other factors are contributing a substantial amount to existing segregation. Dr. Taeuber estimates that perhaps 15 percent of existing segregation is attributable to income differentials, because in fact, economic status and race do not correspond in each individual. That is, not all whites are rich, and not all blacks are poor. Whether the figure of 15 percent is precisely true is not important. For it is clear that noneconomic causes lie behind at least a very substantial amount of the segregation. As best as can be determined, furthermore, blacks who gain economic mobility tend to prefer to move into mixed neighborhoods. Dr. Taeuber, and the court, are led to the conclusion that publicly and privately enforced discrimination accounts for the remainder. Furthermore, much of the segregation force of the factor called economic is in truth attributable to discrimination in access to the means to economic well-being. Based upon the weight of evidence from research, on the basis of which this expert testified, the court finds that discrimination in job opportunities and in educational opportunities has a great and lasting impact on the individual's economic status. In addition, the element labeled choice or preference, insofar as it contributes to segregation, is also composed in part of attitudes produced by past experience with discrimination.

Dr. Taeuber in addition computed indicies of dissimilarity to measure racial segregation in schools of the metropolitan area. In Richmond alone, based on the projected results of the current desegregation plan, as to the elementary schools, he found an index of dissimilarity of 16.2. In the metropolitan community, assuming the same projected enrollments for the city and the continuation of the 1970 enrollments in the two counties, he arrived at an index of dissimilarity of 63.8. Even with zone changes planned for 1971–72 in Henrico, the index is 60.3.[23]

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[23] Dr. Taeuber, in explaining the index of dissimilarity, said, "one way to help understand what this figure means is to say that it gives the percentage of one race that would have to be moved in order to achieve desegregation" I–54.

Thus, the result of imposing the current school division and zone lines upon the existent housing patterns within the Richmond metropolitan area, patterns attributable in large part to public and private discrimination, is to produce a situation in which the results of a hypothetical completely random distribution of the races in housing can only be achieved by moving approximately 60 percent of one or another race (or a lesser number of both) to other facilities than those to which they are now assigned.

It is true that the housing segregation in Richmond corresponds to a widespread national pattern. One would expect so when, as Dr. Taeuber testified, many of the same causal factors are present everywhere.

With respect to persons moving into a community as new residents, as opposed to persons seeking relocation within the area, who might have attachments to a particular neighborhood, Dr. Taeuber stated, and the court finds, that such people are very much governed in their decision upon housing sites by existing patterns of customs and restrictions (T–64).

There is an observable tendency for blacks who can afford better housing not to make, for various reasons, the long jump to a suburban homesite, but rather to move to a peripheral, transitional area (I–64–65).

Spot maps showing the residences of pupils by race in the two county school systems illustrate with particular clarity the segregated housing patterns prevailing in the two counties. At each grade level the same locations in each county show a concentration of black or of white residency with very little mixing or overlap. Dr. Taeuber termed a study of such distribution maps a subjective manner of determining the degree of housing segregation. Perhaps this is so when comparisons over time or from place to place are attempted. But in this instance, the maps adequately demonstrate the current impact of housing segregation upon the distribution of pupils in the counties.

Dr. Jeanne C. Biggar, a specialist in human ecology and demography, performed a study of 1970 census figures to compare population trends in the Richmond standard metropolitan area with those in others in various regions of the country. From 1960 to 1970 the city of Richmond lost about 8 percent of its population. But with the annexation of January 1, 1970, the city's population came to a level 13 percent above that of 1960. In that decade the white population of the city rose 12.7 percent, and the black population rose 13.9 percent; both figures take into account changes attributable to the recent annexation. The gain in blacks experienced by Richmond was somewhat less than that experienced in most cities in the southern region, where black population rose on the average by 23 percent.

Dr. Biggar's studies revealed that the city of Richmond experienced a net loss of white population to other areas within the SMSA[24] greater than that of 18 of the 65 largest SMSA's in the United States and lesser than that in 46 others. It must be recalled, however, that these figures, insofar as they show actual physical movement of population, are affected by the bringing into the central city of 23 square miles and about 44,000 residents, formerly in Chesterfield County. The same observation bears upon her finding that only eight SMSA's showed a lesser degree of black concentration.

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[24] Standard Metropolitan Statistical Area. The Richmond area is made up of the city of Richmond, Henrico, Chesterfield, and Hanover Counties.

The court considers that more appropriate data might have been provided had the areas studied over time been held constant in their physical boundaries, for as Dr. Biggar stated, while she did analyze Richmond without annexation, she had nothing to compare it to.

Dr. Biggar has lived in Virginia for the past 2 years and knows of the existence of racial segregation in communities of the Commonwealth from personal observation.

Martin E. Sloane, an expert with respect to the relationship between housing, school segregation, and Federal programs and policies, and now acting deputy staff director of the U.S. Commission on Civil Rights, has held positions over the past decade in the Federal Government which gave him first hand knowledge of the impact of Federal policies on housing discrimination in the country. In addition, in 1966, he had Federal responsibility for the Civil Rights Commission's study, "Racial Isolation in the Public Schools."

During the last 2 years, while Sloane has been assistant staff director, the Civil Rights Commission has issued reports of Federal installations and equal housing opportunity, section 235 program of homeownership for lower-income families, and evaluation of the civil rights enforcement effort in more than 40 Federal departments and agencies, and a follow-up study based upon a prior report. Sloane's background renders him an especially valuable source of information on the formulation and modification of Federal housing policies, the difficulties of making a policy change effective in fact, and the impact of such policies upon housing patterns and, in consequence, on school segregation.

When the Federal Housing Administration was created in 1934, the Federal Government entered into a role it had not previously assumed. Because of the size of the effort undertaken, the impact of Federal policies, it was anticipated, would probably be very broad. Events have shown this to be true.

Beginning at least in 1935, the FHA underwriting manuals included among the criteria by which the desirability of the particular subdivision was to be estimated, and therefore its value judged, something called "protection from adverse influences."

> Protection against some adverse influences is obtained by the existence and enforcement of proper zoning regulations and appropriate deed restrictions.

The court accepts those administratively promulgated regulations as an accurate statement of the policy of the agency which issued and applied them, and also as a sound judgment of the effectiveness of the means recommended to attain the agency's policy goals.

The 1935 manual continues:

> Important among adverse influences besides those mentioned above, are the following: Infiltration of inharmonious racial or nationality groups . . .
>
> All mortgages on properties in neighborhoods protected against the occurrence or development of unfavorable influences, to the extent that such protection is possible, will

> obtain a high rating of this feature. The absence of protective measures will result in a low rating or, possibly, in rejection of the case.
>
> The appeal of a residential neighborhood results from a general condition and attractiveness of the properties located therein: the kind and social status of the inhabitants . . . (PX 128).
>
> (W)hen fullest advantage has been taken of available means to protect the area against adverse influences and to insure that it will develop into a homogeneous residential district, possessing strong appeal to the class of persons expected to desire accommodations in it, a high neighborhood rating will be warranted.

This passage is from the 1936 manual.

The 1936 FHA Underwriters' Manual states:

> Deed restrictions are apt to prove more effective than a zoning ordinance in providing protection from adverse influences. Where the same deed restrictions apply over a broad area and where these restrictions relate to types of structures, use to which improvements may be put, and racial occupancy, a favorable condition is apt to exist (PX 128).
>
> If, in addition to physical attraction of the neighborhood, the present class of occupants is of such quality as to make the area desirable to the social group which will form the prospective market, additional appeal is created.
>
> Of prime consideration to Valuator is the presence or lack of homogeneity regarding types of dwellings and classes of people living in the neighborhood (PX 128).

The FHA manual of 1936 recognized that the existence of school facilities and their location may strongly influence the development of a neighborhood, many years before the Supreme Court took note of this same process in *Swann:*

> The social class of the parents of children at the school will in many instances have a vital bearing. Thus, although physical surroundings of a neighborhood area may be favorable and conducive to enjoyable, pleasant living in its locations, if the children of people living in such an area are compelled to attend school where the majority or a goodly number of the pupils represent a far lower level of society or incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist. In such an instance it might well be that for the payment of a fee, children of this area could attend another school with pupils of their same social class. The question for the Valuator to determine is the effect created by the necessity for making this payment upon the occupants of the location. Under any conditions the rating could not be as favorable as if the desirable school were available without additional costs. In many instances where a school has earned a prestige through the class of pupils attending, it will be found that such prestige will be a vital

> element in maintaining the desirability of the entire area comprising the school district.

The 1936 FHA manual recognized that the impact of its policies would primarily be upon newly developing areas at the outskirts of the city proper.

> Successful new areas are recognized as the best mortgage-lending areas. To be successful a new or partially developed area must reach a stage of being substantially built up within a period of a very few years. Due to the fact most outlying residential areas will be developed as a result of the decentralization movement rather than as a result of population increases, the economic background of the community assumes great importance, since those communities which will experience a prosperous future will decentralize much faster than those for which a less advantageous future is forecast.
>
> Protection from adverse influences. The Valuator should realize that the need of protection from adverse influence is greater in an undeveloped or partially developed area than in any other type of neighborhood and, in general, a high rating should be given only where adequate zoning regulations or effective deed restrictions exist, inasmuch as these provide the surest protection against undesirable encroachment and inharmonious use.

The manual continues to recommend particular deed restrictions, deemed most effective in maintaining the status of the neighborhood.

> Recorded deed restrictions should strengthen and supplement zoning ordinances and to be really effective should include the provisions listed below. The restrictions should be recorded with the deed and should run for a period of at least 20 years. Recommended restrictions include the following:
>
> (G) Prohibition of the occupancy of properties except by the race for which they are intended.
>
> (H) Appropriate provisions for enforcement.

The 1938 manual advises the underwriter to examine the location to determine whether natural barriers might be effective in forestalling the incursion of adverse influences:

> Natural or artificially established barriers will prove effective in protecting a neighborhood and the location within it from adverse influences. Usually the protection from adverse influences afforded by these means includes prevention of the infiltration of business and industrial users, lower class occupancy, and inharmonious groups.
>
> Areas surrounding a location are investigated to determine whether incompatible racial and social groups are present, for the purpose of making a prediction regarding the probability of the location being invaded by such groups. If a neighborhood is to retain stability, it is necessary the properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally contributes to instability and a decline in values.

By deliberate policy the Federal Housing Administration encouraged the institution and perpetuation of segregated housing. This was the avowed FHA policy from its beginning until well after the end of World War II. Only in 1947 did the FHA remove the caveats in its underwriters' manual advising appraisers about the dangers of "inharmonious racial groups." Somewhat disingenuously, the phrase "inharmonious user groups" was substituted. No policy change was intended, nor did one occur at that time. (K–26)

The Veterans' Administration loan guarantee program commenced at least 10 years after the FHA mortgage insurance program, and the VA never openly advocated segregated housing. It struck a neutral pose, allowing builders or lenders to discriminate if they wished.

At times the combined share of the new housing market assisted by FHA and VA came near to 50 percent. The impact, therefore, of the policies which they favored or condoned was huge.

From the close of World War II until 1959 approximately 2 percent of all the housing covered by FHA mortgage insurance was occupied by blacks. (K–33)

Moreover, their policies drastically influenced the private lending market. This was not only true of the lending vehicles introduced, for the Federal discriminatory policies spread as well to private builders and lenders. Such a tendency was bolstered by the exchange of personnel between the FHA and the private lending industry. The current FHA commissioner formerly was president of the National Association of Home Builders. (K–28)

Policies fixed during the initial years of the FHA spread and have endured to have a substantial effect on the current housing market practices.

Other Federal agencies, such as the Federal National Mortgage Association and the Federal Deposit Insurance Corporation now assist by indirect means most current housing construction. They aid, and at the same time, regulate private lending institutions. The Civil Rights Commission studied the practices of such agencies and found that they had no objection to the private discriminatory policies of their beneficiaries. Even subsequent to the passage of the 1968 Civil Rights Act, agencies in a position to restrict private housing discrimination by means of their regulatory functions have not seen fit to do so. (K–32)

In response to the Supreme Court's decision in *Shelley v. Kraemer*, 334 US 1 (1948), the Federal Housing Administration and the Veterans' Administration ruled, over a year later, that they would not assist the development of property carrying racially restrictive covenents dating after February 15, 1950. Up to that date, however, they offered assistance. In addition, even after that date, they would aid construction plans with discriminatory covenants, provided such covenants were dated prior to February 15, 1950. (E–18)

Congress has directed all governmental agencies to carry out their programs and activities relating to housing in a manner to affirmatively further the purposes of fair housing, yet the Federal Home Loan Bond Board, athough advising those private lending institutions whom they supervise of the prohibition against discrimination, has failed to implement the prohibition by an examination process that would assure against such policies.

The Federal Home Loan Bank Board regulates most of this country's savings and loan associations. They, in turn, handle some 40 percent of the home financing in the United States. As early as 1961 it was urged by the Civil Rights Commission to adopt review procedures to guard against discrimination by the private associations which it supervised; this has not been done. The FHA abandoned the policy of positively encouraging discrimination and adopted a neutral position in late 1949 or early 1950. (K–57)

Dr. Sloan stated as well, and the court finds, that existing patterns of segregation substantially influence the choice of housing site by a new entrant into a community.

Given the history of governmental policies which encouraged segregation, and given the current, visible facts of such policies, it would be several generations before one could discern progress in the elimination of segregated housing patterns, even if the most imaginative and affirmative Federal enforcement programs were undertaken. Families move rarely—on the average, about every 7 years. A change of residence, moreover, has historically been a voluntary act. The Nation now possesses approximately 70 million housing units, built and occupied. Each year sees about 1½ million housing starts. A policy of nondiscrimination would have to be applied in instances of occupancy of new developments or turnover in old units. So confined, progress would be slow indeed.

Like Dr. Pettigrew, Dr. Sloane perceived the immense contribution that housing segregation makes to school segregation. The former he attributed in large part to the effect of Federal policy.

Dr. Biggar stated that nationwide, persons who move tend to give as their motive reasons related to economics and convenience. It is more difficult to determine why certain others do not move. Studies tend to show that younger people are more willing to move, whereas families with children established in a particular school are less inclined to do so.

Plaintiffs' exhibit No. 127 taken from the records of the Federal Housing Administration, and from covenant books of lawyers Title Insurance Co. is illustrative of examples of racially restricted subdivisions in Chesterfield and Henrico Counties. These developments were all insured by the Federal Housing Administration.

Plaintiffs' exhibit No. 130 shows the current racial occupancy of the FHA-assisted developments. Of the four completed projects as to which information is available, three are almost entirely uniracial. Fair Hills Apartments has one white-occupied unit and 223 black-occupied units. Jefferson Townhouses has 276 units, of which only two are occupied by whites. The Town and Country Apartments, 202 units, has 198 white-occupied units. Coventry Gardens, 176 units, is occupied by 25 black and 151 white families.

Plaintiffs' exhibit No. 129 corresponds to plaintiffs' exhibit No. 129–A. Data given on exhibit No. 129 is the racial occupancy of FHA sponsored housing projects in the Richmond metropolitan area. All are either in Richmond city or Henrico County. To the extent that information is available, it portrays a pattern of almost complete segregation. The map shows that the projects with largely black occupancy are placed toward the center of zones of that racial composition.

The section 221(d)3 program and the section 236 program contemplate the development of market-rate housing for low- and middle-income families. Only if a rent supplement component is added to the project is it possible to charge levels of rent comparable to those in public housing.

The Federal rent supplement program is aimed at roughly the same individuals who are eligible for public housing. Development is done by private builders. However, the Federal Government requires occupants to devote one-quarter of their income to rent and the rent supplement meets the remainder of the bill. By Federal law, before appropriations can be used to pay the rent supplement, the area in which the program is to be used must have adopted a "workable program for community improvement" or, at least, there must be an endorsement of the rent suplement program by the local governing unit. Most central cities have "workable programs," generally for urban renewal purposes. Seventy-five percent of suburban jurisdictions do not. With this limitation, the rent supplement program has functioned to maintain concentrations from the poor within central cities and to prevent access to suburban areas. Exactly this phenomenon is visible in the Richmond metropolitan area. Neither of the two counties has a "workable program"; neither has resolved to permit the operation of rent supplement programs within its borders, and consequently none of the federally assisted housing developments in either county has a rent supplement component. The rent they charge, therefore, is the market rate.

In March of 1971, the Federal Housing Administration waived the requirement that the local governing bodies, in order to permit the operation of a rent supplement program within their jurisdiction, pass a resolution to that effect on a jurisdictionwide basis. Instead, it would be sufficient to restrict permission to operate rent supplement programs to a small area.

In November of 1962, President Kennedy isued an executive order directing all Federal agencies with authority in the field to cease discrimination in the operation of housing programs. Excluded from the order, however, were financial regulatory agencies supervising private lenders.

From 1937 until 1962, Federal officials administering public housing programs made no objection if local public housing authorities planned developments and assigned tenants on a racially segregated basis.

As of October 1970, the Federal Department of Housing and Urban Development had taken almost no affirmative action to implement the Federal fair housing law. In Sloane's words, "the zeal with which this agency and its constituent agency had carried out policies of discrimination in earlier years was not being matched by a similar enthusiasm in carrying out its newly created fair housing activities." (K–37)

Up to 1962, site selection for public housing projects was almost entirely unrestricted by Federal authorities. Choice was left to the discretion of the local housing authority.

Nationwide, given the Federal policy and permitting discriminatory assignments of tenants and failure to control site selection, the public housing program has been an important factor in entrenching patterns of racial segregation in housing. Only in 1967 did the Public Housing Administration insist on a policy of "balanced" site selection by local housing authorities. Such policy requires that for each development placed in a black community, one also be located in a principally white area in order to deconcentrate areas of minority occupancy. Even this policy, however, is not likely to contribute substanially to the elimination of housing segregation.

It is unlikely in the extreme that housing segregation could effectively be dealt with within municipal boundaries, given the existing segregation in most metropolitan areas. Much greater advances could be made by housing authority equipped to plan and carry out policy on a basis not confined, geographically, to a single jurisdiction of a metropolitan area.

The Richmond Redevelopment and Housing Authority is the city's public housing agency. It has operated since 1940.

According to the most recent estimate of the agency's executive director, about 23 percent of the city's housing supply within the pre-1970 boundaries is substandard, according to its criteria. About 1,600 families are now on the waiting list for admission to public housing. In 1970, Chesterfield had 4,518 substandard units, or 11.7 percent; Henrico had 5,886, or 11.2 percent.

Richmond now has eight low-income public housing projects in operation. They are principally occupied by blacks and are located in predominantly black areas. (H–163) (PX 130a) Likewise, projects under section 221(d)(3) are located principally in such areas.

Prior to 1962, it was required by the Federal Housing Authority that public housing be classified for occupancy by a particular race. Only one Richmond development, Hillside Court, was built for whites.

Within the city of Richmond, there are inadequate numbers of sites currently available to house those now in substandard housing and those displaced by public condemnation. (H–164)

In recent months the Federal Housing Authority has made efforts to secure sites in the city for low-income housing in areas without heavy concentrations of minorities. Of 523 proposed apartment units, 112 were finally approved. A proposal for 100 units of housing for the elderly in the newly annexed portion of the city was rejected by the city council. According to the executive director, there was "violent citizen opposition" to this proposal. Three other developments in predominantly white areas, comprising 311 units, likewise were rejected in early 1971.

There are no public housing authorities in Henrico and Chesterfield. Legally, the Richmond Redevelopment and Housing Authority might construct developments in those areas. Both counties have stated their opposition to public housing within their borders. Richmond officials, therefore, thought it a vain act to seek their permission. (H–167)

In the opinion of the executive director of the Redevelopment and Housing Authority, given the attitude of those who determine the location of public housing and the scarcity of sites within the city, there is no realistic possibility that current racial segregation and housing in the Richmond community might be disestablished by the placement of public housing units. In fact, segregation is enhanced, in his opinion, which the Court accepts, by the construction of projects in black or transitional areas. The difficulty in dispersing public housing units throughout the Richmond metropolitan area by placing them on sites within the city is not solely one of noncooperation by the city council, although that is a major factor. The city council asserted in the annexation case against Chesterfield a need for land for projects of low- and middle-income housing. Enough open space was acquired from Chesterfield for the purposes ascribed, yet when application by the Richmond Redevelopment and Housing Authority was made for approval of city council, city council, as the witness Fay said, "reacting to pressure from residents of the area," refused to give its approval. Even considering the newly annexed area, the city of Richmond has hardly sufficient areas suitable for development to accommodate more than a small fraction of the estimated 5,500 units of low- and middle-income housing needed to alleviate the substandard housing problem.

The housing authority currently is limited in its choice of sites by HUD regulations requiring placement that will not contribute to housing segregation, and by popular feeling in black communities that other areas should accept a fair share of housing for the poor.

From 1900 through 1942 population growth in the three jurisdictions took place almost entirely in the city. From 1942 to 1968, however, 99 percent of the added population settled in the two counties. Over the past 10 years the net immigration of blacks and other minority races into the city of Richmond was 782 persons. In the same time about 14,300 whites entered the city; these figures are affected by the 1970 annexation of approximately 44,000 people, formerly residents of Chesterfield County.

In 1959 a consulting firm, the Public Administration Service, contracted to perform a study and recommend changes in the government system of the Richmond metropolitan area. The product of its efforts is the so-called PAS report.

On February 24, 1958, the Chesterfield Board of Supervisors agreed to meet with Mr. Howe Todd, executive secretary of the Metropolitan Planning Commission, for an explanation of the report prepared by the Public Administration Service.

On April 16, 1959, Howe Todd appeared before the Board of Supervisors of Chesterfield on behalf of the Regional Planning Commission to seek guidance as the action to be taken in response to the PAS report. The board requested the commission to "continue the study of the PAS report and make specific recommendations on some future date."

The PAS report was brought to the attention of the governing body of Henrico County.

The total white school enrollment was exceeded by the total black enrollment in Richmond first in September 1958. The PAS report advised the jurisdictions of the Richmond metropolitan area about the out-migration of white families from the city: "The migration of young white families from Richmond into the counties is changing the racial characteristics of the city to the extent that nonwhite school enrollment exceeded white school enrollment in Richmond for the first time in 1958. The nonwhite birth rate is also higher than the white birth rate in the city. School transfers reflect a net loss of white students in Richmond schools and a net gain of nonwhite students. The opposite effects are noted in the counties."

Mr. Edward Council, executive director of the Richmond Regional Planning District Commission, like numerous other witnesses, had no doubt that lending and insuring practices carried on by the Federal Housing Administration and the Veterans' Administration were the major factor leading to racially identifiable residential patterns (F-29).

In addition, he cited low income as a factor restricting access to many neighborhoods.

The regional planning commission, in 1964 or 1965, studied factors governing the choice of new homes by those 1,300 families displaced by a city urban renewal project. It found that preference, seen as a combination of convenience, past associations with friends, proximity to jobs, stores, and schools, was a major factor governing the decision of where to relocate (F-31).

Council noted, nonetheless, that several areas in Richmond are predictably closed to black families, regardless of their income or choice (F-32).

According to a recent study by the regional planning district commission, there is no evidence to support an inference of racially discriminatory zoning practices in the Richmond, Henrico, and Chesterfield area (F-36).

The Richmond Regional Planning District Commission is the successor agency to the Richmond Regional Planning Commission. The former was set up in 1969, under the Virginia area development act. The regional planning commission dated from 1956, and included only the jurisdictions of Chesterfield, Henrico, and Richmond, during most of its existence.

The regional planning commission in February of 1964, published a study of population trends in the Richmond region. The study bears a letter of transmittal to the three political jurisdictions, Richmond, Henrico, and Chesterfield, signed by Irvin G. Horner, a member of the Chesterfield Board of Supervisors, and then chairman of the regional planning commission (I-80). The report called to the attention of the recipients that Richmond in 1960 had a population 42 percent nonwhite.

It contains the information that in the prior decade the city of Richmond had lost 29,600 white residents and gained 19,250 black residents. It continues: "As 1964 begins there are several indications that if Richmond's population is going to grow at all by its own momentum, people will come in the nonwhite sector. Thus, the present trends hold forth the very real prospect of a nonwhite majority in Richmond by 1970; however, that prospect is subject to maintaining the present city limits" (I-81).

The report notes factors governing migration into and out of the city in the foreseeable future, citing "a continuing lack of attractiveness of the central city with its congestion, blight crime rate, and changing racial composition, particularly to the white age groups which foster the greatest population increases through migration and natural increases. Too, there is a lingering apprehensiveness among this group about confronting the city school situation where nonwhites already out number white students" (I-84-85).

In 1966 the general assembly established the Hahn Commission to suggest solutions to metropolitan problems. In November of 1967 the

Hahn Commission report was submitted. The commission reported, "two broad factors contribute to the limited success of government in Metropolitan Virginia. The first of these is the failure of the State to assume a more positive role in restructuring its political subdivisions and encouraging them to work together on matters involving areawide resources and needs. The second is the inadequacy of local government individually to meet areawide problems. This inadequacy stems from limited jurisdiction, limited finances, and insufficient governmental cooperation.

> The State is sovereign and the political subdivisions such as counties and cities are creatures of the State, created for the purpose of fulfilling a part of the State's responsibility to its citizens. The general assembly, within constitutional limitations, may revise constitutional structure, abolish or create local governments, assign new functions or renew existing ones. Although this power rests in large part on legal precedent and historical tradition, it exists also for practical reasons. The State has the geographic social base to make broad policy decisions effective.

The report relates that inaction at the State level is often accompanied by inaction at the local level as well. It notes the tendency in certain restricted fields of the State to assume responsibility, often with some success.

By reports such as these, and in particular the Hahn Commission report, the attention of State and local officials was brought to the fact that existing patterns of administration were incapable of solving urgent metropolitan problems.

According to Mr. Council's judgment, the Virginia General Assembly adopted almost to the letter the dissent annexed to the Hahn in suburbs (HX 25, 4–3).

The SUA consultants reported to their county clients in 1967 on the high nonwhite percentage of Richmond's population and the comparatively very low percentage in the counties. The reporters continued:

> And there is every reason to believe that life in the Richmond metropolitan area is becoming more segregated with time, rather than less segregated. By that we mean nonwhite populations are continuing to be concentrated in the city of Richmond, and the small nonwhite percentages in Henrico and Chesterfield Counties are likely to become even smaller with time as the white population in these counties continues to expand.

At the present time there is little reason to believe that the State of Virginia or the U.S. Government is likely to adopt legislation, such as a Fair Housing Act, which would significantly alter this pattern of concentrating Negro housing in central cities and white housing in suburbs (HX 25, at 4–3).

The following diagnosis of social and economic disparities in the Richmond region was made:

> The outward movement of people has been from the relatively higher income, white segment of the population. This

> has resulted in there being a disproportionate number of Negroes in Richmond. As the percentage of Negroes exceeds national averages, another form of segregation is created and must be alleviated. The concentration of the disadvantaged and the economically deprived in a limited area and intolerable housing prevents their rising out of such conditions. The dense concentration of any low income, poorly educated group in decrepit housing multiplies the costs of governmental services.
>
> * * * * *
>
> Much more must be done in education, from preschool through high school education and vocational training. All officials in all levels of government must participate in the improvement of education for the Negroes and developing employment opportunities that permit growth and full utilization of aspirations, education, and abilities.
>
> A continually growing concentration of the Negroes without improvements in housing, education, and opportunities will further increase the disparities between the central city and the suburbs, making cooperative regional action more difficult in eradicating the disparities (RSBX 47, at 3-2).

In July of 1970, the regional planning district commission published a document entitled "Housing in the Richmond Region." According to the report in 1961 the city had 886 acres of housing which was considered 50 percent blighted or more. These areas were around the central business district of the city and were occupied principally by blacks. The report related that there were 42,991 substandard housing units in the region as a whole, of which 14,000 were occupied by blacks. Nearly 50 percent of the blacks in the region lived in such housing, whereas only 15 percent of white families were so disadvantaged. The report continues:

> A racially segregated housing pattern in the Richmond area was reported in the Revised Initial Housing Element in November 1969. This pattern has been an historical trend, but contemporary factors act to prolong segregation. It is fairly clear that a desegregated housing pattern will become a reality only when these factors cease to be important.
>
> The most important factor is economic. The 1960 census reported a median income for all families in the SMSA of $6,071; but for nonwhite families in Richmond, the median was $3,387. While nonwhite incomes have increased during the past decade in the Nation, those of whites have grown even more rapidly. Thus, the gap is probably even greater in 1970 than it was in 1960. Low incomes continue to limit the residential locations of most nonwhite families in the region. A major reason for lower income among Negroes, as previously reported, is the lower median educational level among nonwhites in the region.
>
> The role that social factors play in the housing situation basing nonwhite families is difficult to discern. Even if there were no social barriers, many nonwhite families would wish

> to reside in nonwhite neighborhoods. But the fact is that there are many areas in the region in which the nonwhite family is not likely to reside, regardless of their resources or preferences. This has necessitated the choice of housing of a quality below which their desires and incomes would normally dictate (Tr. F–13–14).

The "Paths to Progress" report, in suggesting efforts to prevent the spread of blight, had specific recommendations:

> More specifically, reorganization of local tax structures, as previously mentioned, and the achievement of true open housing might provide the most significant long-range influences on stabilization (PX 148, at 28).

The 1970 report of the planning district commission quoted the existence of poverty areas, mostly inhabited by blacks, subject to a cycle of decay.

> Selected areas of the central city and rural jurisdictions are characterized by relatively high percentages of unemployed and under employed residents. These same areas contain most of the region's poverty families as well and thus are least able to cope with unemployment problems. Nonwhites are hardest hit of ethnic and racial groups, and reflect an unemployment rate three times that of the region's average . . . . Despite this alarming concentration of circumstances, industrial and commercial firms are facing labor shortages. Even small businesses are finding it difficult to recruit help. Because of these reasons, the several dimensions of this problem are apparent: The vicious cycle of poverty, particularly among the nonwhite; the adverse conditions which confront the labor situation and thus industrial development expansion; and the difficulties which face the small businessman.
>
> A further characteristic of these isolated sections of the region is that most of the area's substandard housing—an additional burden on these residents—is located there also. With nearly one of every two families unable to afford the single family homes currently being constructed and an increasing number of families forced to live in substandard units, over 1,000 new households will not be supplied with standard housing this year—and in future years, if the current market situation does not change drastically. The problem of substandard housing, thus, is an increasing one.
>
> * * * * * * *
>
> Working against finding workable solutions to these and other social-cultural problems is the tendency of local governments and citizens, too, to view such problems as being intrajurisdictional in nature and therefore none of their concern (PC 148, at 32–33).

The planning district commission reported on the contribution of discriminatory practices to economic inequality.

> An underlying factor contributing to the above problems is racial (and to a lesser extent, economic) discrimination.

> Housing restricted by regulations or by customs, differential hiring practices, and denial of equal opportunity based on racial, ethnic or class discrimination have all been realities of regional life in the past. Although the trend appears to be away from such practices, much remains to be done before discrimination ceases to be an influence upon the regional economy (PX 148, at 9).

The Commission concluded in addition that blacks face discrimination in attempting to set up and operate black-owned businesses. As a result, few such businesses exist, and those which do are financially less secure (PX 148, at 11). The report called on local governments to cooperate with private parties to eliminate such discrimination (PX 148, at 14).

The commission reported that:

> Lack of employment among minority group members, however, has been far above 3 percent. In Richmond's model neighborhood area, for example, the unemployment rate is estimated to be approximately four times the SMSA rate. No direct estimates of underemployment are available. Once again, though, there are indications that minority groups suffer more from underemployment than does the rest of the region's population. The 1960 census showed the median family income in the SMSA to be $6,071—a figure 79 percent higher than the comparable figure for nonwhites of $3,387. While nonwhite incomes have grown significantly since 1960, it is believed that the 1970 census will show that family incomes for the rest of the region's population has risen even faster (PX 148, at 23).

It further states:

> Discriminatory practices while being more difficult to discern, nonetheless contribute a major source of problems of a regional nature. Racially, the region consists of 30 percent nonwhites, most of which are black. All district jurisdictions except Henrico and Chesterfield Counties, have significant black population. The four rural counties have from 36 percent to 84 percent black residents and the city's ratio exceeds 40 percent. The major result of such practices are reflected in housing, employment, and educational opportunities. Historically, residentially, segregated housing patterns perpetuated by discriminatory real estate practices have combined to deny economic and educational opportunities available to whites, as well as other nonwhite groups (TR F–17).

HENRICO

Dr. Campbell said that in Henrico County, "We have both black and white living short distances from where I live, and black people all over Henrico County, scattered just everywhere, practically any way you turn" (H–79). In fact, this is not the case. Housing patterns in Henrico are segregated. When blacks move into the county, they settle principally in colonies. New residents expand areas of black occupancy, but the process is always one of contiguous growth.

Unrefuted evidence supports the existence of a custom of privately administered housing segregation in the county of Henrico. James H. Johnson was seeking a house in Henrico County in August of 1970. In response to a newspaper advertisement for a house in the Chamberlayne Heights section of Henrico, Johnson made an appointment to meet with a real estate agent. Johnson saw the agent at the appointed place and time, but the man eluded him, despite Johnson's efforts to stop him. Johnson later telephoned the agent; this man did not deny having made the appointment, but Johnson made no further efforts to purchase the house because he was able to conclude that it was unavailable to him, a black. On another occasion, Johnson and his wife were discouraged from attempting to purchase a house with the explanation that the house had already been sold. They inquired again, this time by telephone, made an appointment, and arrived to find that the realtor had "forgotten" his key to the house. Johnson filed a complaint with the Department of Housing and Urban Development. Thereafter the owner of the house terminated the agency of the realtor.

The school superintendent, Dr. Campbell, was unaware of any housing segregation in the county of Henrico (II-79). Plaintiffs' exhibit 98, a map of the Richmond metropolitan area, illustrates 1970 census figures for racial distribution. Although blacks comprise somewhere around 10 percent of the county's population, in certain areas from 20 to 40 percent of the residents of census tracts are black. And one area to the immediate northeast of the city's boundary contains 60 to 80 percent black residents.

This map also illustrates a remarkable congruence between the city's boundary and patterns of racial occupancy. Along an extended portion of the city's northeast boundary, census tracts on the county side are occupied by 0 to 19.9 percent black persons, whereas on the city's side, residency is between 40 and 100 percent black.

Moreover, if it is accurate that blacks live throughout Henrico County, one might expect that school authorities' use of a neighborhood attendance plan would result in a fairly even distribution of black pupils throughout the system's schools. However, this is not the case. Many Henrico schools have a very low black enrollment. Some have none.

Alfred Henderson, a resident of Henrico County, testified to his efforts to develop an apartment project on vacant land he owned in the county. Henderson is black. Recently, the area surrounding Henderson's land had been rezoned to R-5. The Henrico Planning Commission approved rezoning of his own 20 acres of land from A-1, agricultural, to R-5, residential classification, but the rezoning of 10 of the 20 acres was contingent upon Henderson's securing additional access routes. The county board of supervisors approved the rezoning of 10 acres. Thereafter, Henderson approached the Federal Housing Administration for their recommendations on developing the area. FHA officials advised Henderson to consider constructing a federally assisted project under section 221D(3), with a rent supplement component.

In order to take advantage of the Federal rent supplement program, the approval of the county board of supervisors was necessary because Henrico County did not have in effect a "workable program" for housing development in the area. Henderson appeared before the board to request such a resolution. He told them that, "We, as a county, have no place for our unfortunate families, and that I felt that sooner or later somebody would come along and force us to make steps to take care of our unfortunate families . . . . I made the statement that Henrico County could not indefinitely dump their unfortunate families on Richmond" (E–38). On December 9, 1970, the board of supervisors declined to pass the resolution requested (PX–91).

In Henrico County after World War II, the major period of growth was the decade 1951–60. In that timespan 420 subdivisions with 15,142 lots were made. In 1961–70, the statistics were 239 subdivisions with 5,639 lots (HX 24).

Prior to 1950, Lawyers Title Insurance Co. insured title on 73 subdivisions in Henrico County with racially restrictive covenants and 91 without. Subsequent to 1950 five subdivisions had such covenants and 191 did not.

At least three subdivisions with racially restrictive covenants in Henrico now have black residents.

At meetings of the Henrico County Board of Supervisors perhaps 20 percent of the items on a typical agenda concern zoning.

In Henrico County there is a total of 37,000 acres zoned from classification R–O through R–TH. Single family residences can be built on all this area. The minimum house size generally is 900 square feet, and somewhat less in some areas. One-family houses can also be built in A–1 agricultural districts, which cover 93,000 acres in the county. In toto, Henrico covers 131,000 acres. Therefore, 84 percent of the county's area may be used to construct one-family dwellings. The number which could be built is not in evidence.

The minimum dwelling size in the R–O zoning area in Henrico is 1,600 square feet.

When the city of Richmond and the Federal Public Housing Authority undertook, in 1946, to create several hundred housing units on federally owned land in Henrico County, the Henrico Board of Supervisors, by resolution, stated that such a project would be detrimental to the community and requested the city and the Federal agency not to go forward with the plans unless absolutely necessary (PX 121, at 242).

Although Henrico County has obtained Federal grants to assist its police and develop its utilities, it has no one person in its administration in charge of coordinating Federal programs. There is no public housing in Henrico County (Beck).

In Henrico County no section 221–d–3 programs have been built, nor are any applications pending. Several section 236 projects have been constructed or approved for construction in Henrico. However, none of these incorporates a rent supplement component (Young).

The court finds it unnecessary to relate in detail how the discovery material, admitted in evidence, shows that the public employment in Henrico and Chesterfield Counties over the years has been available almost exclusively to whites (PX 104, 105, 106, 107a, 107b, 107c). Knowledge of such job discrimination can hardly have encouraged a black resident to change his place of residence to one of the counties.

Until very recently the Henrico County government required that county employees reside within the county. This rule was relaxed in 1970; that year the county hired its first black policeman (Beck).

Recreational facilities available to the public are located at several Henrico County schools. The county manager was unaware whether most recreational facilities in the county were planned on a segregated basis. However, it is apparent that in 1962 schools in the city and the county were racially designated (RSBX 86, at city exhibit 179).

The population densities, according to 1970 census figures, of the magisterial districts of Henrico County are as follows: Tuckahoe, 1.61 persons per acre; Three Chopt, 1.75 persons per acre; Brookland, 1.64 persons per acre; Fairfield, 1.37 persons per acre; Varina, 0.38 persons per acre (HX 38).

CHESTERFIELD

Chesterfield exhibit 10, a map of the entire county showing those areas occupied by blacks, illustrates the manner in which the black citizens have settled in small, contiguous cells rather than being widely dispersed among the population at large. It also appears from the map that those parts of Chesterfield closest to the border with the city of Richmond are occupied principally by whites. The rapid outward development of the suburban fringes of Richmond in this direction has occurred without the incursion of any substantial number of Negroes. Exhibit 12, showing multifamily dwellings in operation or projected in Chesterfield County, illustrates that the locations of these units do not correspond to the concentrations of black occupancy shown on exhibit 10. Such visual demonstrations show in a more objective manner the extent of the housing segregation which Dr. Taeuber discussed.

There is unrebutted circumstantial evidence that in Chesterfield, as in Henrico, discrimination on the basis of race effectively limits the choice of housing locations available to blacks. James H. Taylor, Jr., an employee of Chesterfield County public schools, and an educator, testified to his own difficulties as recently as July 1971, in attempting to buy a home in Chesterfield. Taylor is black. He sought without success to buy a home in the immediate neighborhood of the school to which he was assigned.

All but four of the subdivisions on the plaintiffs' list of those in Chesterfield County which employ racially restrictive covenants were built in the now annexed area of the city of Richmond. This annexation, however, took place in January of 1970. When the subdivisions were developed over many years before that these covenants contributed to the creation of a white barrier to black settlement in the northern parts of the county.

There are 363 subdivisions in Chesterfield County with title insurance handled by Lawyers Title Insurance Co. Of these, 37 subdivisions with 3,323 lots had racially restrictive covenants incorporated in their documents of title. All were recorded prior to 1950 except one, dating from 1955, 14,154 lots in 326 subdivisions did not have racially restrictive covenants (CX 37, 38).

On December 11, 1945, the board of supervisors adopted a zoning ordinance of countywide scope.

On April 13, 1948, the Chesterfield Board of Supervisors passed a subdivision control ordinance (PX 117, at 46–50).

On December 9, 1952, the board of supervisors passed an ordinance defining the powers and duties of the county planning commission (PX 117, at 66–68).

In the 1940's, the Chesterfield County Board of Supervisors approved the construction of an airport in the county and granted a special use permit allowing the operation of a midget auto racing tract over the protests of black residents.

Subsequent to the passage of the zoning ordinance, the board of supervisors' minutes are replete with instances of decisions on applications for rezoning. (See, that is, PX 117, at 36, 40, 44.)

It is true that a very high proportion of the land in Chesterfield County is available for residential building, because agriculturally zoned land can be so used. However, without having been shown otherwise, the court assumes that most of the land zoned for agricultural uses is in fairly large plots. Without being rezoned and subdivided, for residential uses, therefore, it is of little practical economical use as residential land.

In areas zoned for agricultural uses in Chesterfield, multi-family dwellings are not permitted; 393 of 426 subdivisions constructed in Chesterfield were begun after 1954. These comprise 13,411 of 14,199 developed lots (CX 21).

Under Chesterfield County land use ordinances the minimum building size requirement for 95 percent of the county is 400 square feet. In the remainder, zoned R–A residential, the minimum size is 2,000 square feet. Chesterfield exhibit No. 8 is a zoning map of the county areas zoned R–A shown in green. In the past, the Chesterfield Board of Supervisors has granted variances from the building square footage requirements so as to permit blacks to move into R–A zones.

From April 2, 1938, to date, no lawsuits were brought in the Circuit Court of Chesterfield County, the court of general jurisdiction there, to enforce racially restrictive covenants upon real property. We have, however, voluminous evidence of the existence of such covenants. It stands to reason that such clauses would not have been employed so generally were they considered vain words. It was the judgment of the Federal Housing Administration that such covenants were necessary and effective means to exclude blacks from ownership of real property. It was also the judgment of the Civil Rights Division of the Department of Justice that the existence of such covenants in outstanding deed and title insurance policies would deter both purchasers and sellers from violating their terms. The judgment of such Federal agencies is entitled to considerable weight. *Ehlert* v. *United States, 39 L. Wk. 4453* (U.S. April 1971). Segregated occupancy patterns exist and discriminatory practices in real estate trading persist to this day.

The county of Chesterfield declined to join the Richmond Regional Planning District Commission. One factor in this decision was its determination to retain full control over the county's rate of expansion. When the planning district commission came into being a study was being conducted concerning the consolidation of Richmond metropolitan area utilities. The rate of expansion of utilities services largely governs the rate of development, and Chesterfield feared that control over utilities might fall into outside hands.

Executive Secretary Burnett agreed that in most cases people desire to live reasonably close to their places of employment. Especially this is true of the poor who often depend upon public transportation for access to work. Public transportation within Chesterfield County is very scanty. The Virginia Transit Co. runs one bus to the DuPont plant, just across the county line; and the Bon Air Transit Co. operates a single bus in the northern part of the county.

The Chesterfield police, fire, sheriffs, data processing, real estate assessors, and welfare department are manned almost entirely by whites. Blacks occupy at best menial positions.

In 1965, the Richmond Times-Dispatch, the newspaper with the largest circulation in the Richmond metropolitan area, permitted racial designations in its help wanted columns. This practice continued until April 16, 1968.

Until May 1968, advertisers in the real estate sales section were permitted to use the designation, "colored" in classified advertisements (PX 41). The "colored" designation was principally used in a separate column of real estate advertisements, not devoted, like other columns, to locations in a particular zone of the city. When the racial designations were abandoned in 1968, this separate column was continued. When the Department of Justice protested the use of this "houses for sale (134)" column in the morning and evening newspapers published in Richmond, the practice was, in 1971, after a delay of nearly 11 months, abandoned (PX 42 a-c).

In November of 1969, the Civil Rights Division of the Department of Justice advised the Lawyers Title Insurance Co., in Richmond, that an investigation had disclosed to it that the company carried, in its title insurance policies, racial restrictions included in documents of title real property. The Justice Department asserted that such practice violated title 8 of the 1968 Civil Rights Act, 42 U.S.C., 3604(c). Assistant Attorney General Jerris Leonard, writing for the Justice Department, stated that, "We believe that the inclusion of racial restrictions in title insurance policies has the inevitable effect of discouraging white persons from permitting Negro occupancy of dwellings subject to the restrictions, and of discouraging Negroes from attempting to secure title to affected property." President Scott, of Lawyers Title, responded that he did not consider the prevailing practice to be a violation of the act, but that the company would not make reference to racial restrictions in title policies issued in the future. Very promptly the insurance company forwarded to all branch offices a memorandum instructing its agents and employees to eliminate racial restrictions as qualifications on title insurance policies (E-17).

On June 29, 1971, the President of the United States submitted to Congress a third annual report on national housing goals, prepared by the Secretary of Housing and Urban Development. The report states, at page 26, "residential separation of racial minorities was, and is, another characteristic of the social environment which has been influenced by Federal housing policy. Until 1949 FHA officially sanctioned and perpetuated community patterns of residential separation based on race by refusing to insure mortgages in neighborhoods not racially homogenous. The effects of this policy have persisted for many years after its reversal and are still evident in metropolitan areas today" (PX-126, at 26).

County and State defendants make much of the fact that housing discrimination in the Richmond metropolitan area has been traced in part, not to the activities of State agencies' defendants, but to those of the Federal Government, through its Federal Housing Administration, the Veterans' Administration, and the Federal Housing Authority. Passing for the moment the question whether, it being shown that governmental action has brought about school segregation, other governmental units ought not to participate in remedial efforts, it is clear that local authorities have in fact played a role in bringing about existing segregation. Public housing, for example, is affected by the action of the political bodies of each of the three jurisdictions concerned. The uncontradicted evidence is that the counties will not accept such projects within their boundaries. In the city, public housing is administered by an agency owing its existence to a State enabling act. Its efforts, too, are circumscribed by the need for leave to proceed by the Richmond City Council. Racially restrictive covenants likewise gain their interrorem effect from the possibility of State judicial enforcement. And subdivisions insured on such a great scale by Federal agencies are undertaken by leave of local governing bodies, pursuant to the terms of zoning and subdivision ordinances.

Housing discrimination in Richmond has received some official support on subdivision approval practices. In some instances deep through lots have been employed which work to insulate a projected white community from adjacent black neighborhoods. Three or four times in the past 20 years block lengths have been increased to create buffer zones to maintain racial boundaries.

Since at least January of 1948, the city of Richmond has possessed regulatory power over subdivisions developed in adjoining counties within 5 miles of the city limits.

The majority of the subdivisions developed in the area of Richmond, Chesterfield, Henrico, and Hanover and recorded with the Lawyers Title Insurance Co. up until early 1950 contained racially restrictive covenants. (Tr. June 24, 1970, at 835, admitted by stipulation.) At that time the FHA and VA withdrew their approval of such practices. Even thereafter some builders retained them. New subdivision construction since that time has been almost nonexistent in the city, save in the area annexed in 1970.

CONCLUSION

There are pending motions filed on behalf of the State and county defendants to dismiss the amended complaint, which motions were held in abeyance and which obviously must be denied for reasons which have been already amply covered in this memorandum. In addition there is a motion to dismiss the cross-claim of the defendant, Richmond School Board, which motion was filed by the State and county defendants, and this too shall be denied.

The standing of the city school board to maintain an action such as this by means of filing a cross-claim is not open to serious question. That board has the constitutional obligation to take such steps as will not hinder it in affording the pupils whom it educates equal educational opportunities. School boards in the past have been permitted to bring a suit against those who threaten to interrupt the desegregation process or make it impossible. See *Brewer* v. *Hoxie School District, No. 46*, 238 F. 2d 91 (8th cir. 1956).

In the instant case, said defendants with constitutional obligations had been sued. The school board's cross-claim is brought in the capacity of the board as guardian, as it were, for the pupils in the Richmond city schools, and as such its action is brought on behalf of the white and the black students. While the plaintiff class consists only of black students, white students as well have a standing to sue to rectify a situation wherein the process of desegregation imposes unequal and unfair burdens upon them as opposed to others. On that basis alone the standing of the Richmond School Board is secure, for no one but they here represent the interests of the white school children in the city of Richmond. In addition, were school boards not to be accorded standing, serious deprivations to constitutional rights might occur, especially in situations wherein individual plaintiffs might well lack the resources to bring and maintain the type of mammoth law suit involved. Conceivably a school board could sue the class of black plaintiffs educated by it for declaratory judgment of rights and liberties and, to stretch the hypothetical, it might move for joinder of adjoining communities or higher State authorities as necessary parties, as has been done in this case. Such a solution, however, is unwieldy and bears the danger of collusive lawsuits, especially where no parties other than a local school board and its constituent pupils are before the court.

Obviously in some cases school boards resist and in others they press for relief by means of desegregation. In the latter case it is much the preferable course to preserve the adversary context [25] essential for the development of legal and factual issues, by granting a school board standing, if no plaintiff, to sue on behalf of its students. One of the purposes of requirement of standing, after all, is to preserve a genuine adversary context. The court is confident that in this instance that has been accomplished.

During the hearing objections were made by the attorney general's office as to the availability of certain documents sought by the plaintiffs. The court has concluded that the objections made were insubstantial and has considered in its conclusions certain of those documents to which objection was made.

The court's order will provide for reports to be filed as to the progress made in conformity with said order. It is to be remembered, however, that the court stands ready at any time to consider any proposed modifications to the plan to be approved.

While the viable racial mix contemplated by the plan is educationally sound and would indeed result in a unitary system, variations from that suggested viable mix may be unavoidable. All parties are admonished that it is not the intention of the court to require a particular degree of racial balance or mixing. If in the implementation of the plan improved modifications seem appropriate, the court stands ready to entertain them.

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[25] *Whitley* v. *Wilson City Board of Education*, 427 F. 2d 179 (4th Cir. 1970).

It is the duty of a court of equity in other circumstances outside the school desegregation context fully to resolve a violation of Federal law, and the remedy must, based on simple considerations of practicality, address itself to the current circumstances. Decrees speak from the time of their entry. *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 445 (2d Cir. 1945).

An order consistent with these findings of fact and conclusions of law will be entered.

ROBERT R. MERHIGE, Jr.,
U.S. District Judge.

JANUARY 5, 1972.

Civ. Action 3353 (D.C. East. Va. (1972))

For the reasons stated in the memorandum of the Court dated January 5, 1972, and deeming it proper so to do, it is adjudged and ordered that:

1. The respective motions of the county and State defendants to dismiss the amended complaint be, and the same are hereby, denied.

2. The motion for leave to amend answer and cross-claim filed by the school board of the city of Richmond be, and the same is hereby, granted.

3. The motion of the respective county and State defendants to dismiss the cross-claim filed by the Richmond School Board be, and the same is hereby denied.

It is further adjudged, ordered, and decreed that:

4. Billy W. Frazier, William P. Poff, and Elizabeth M. Rogers, be, and they are hereby, added as party defendants, individually and in their official capacity as members of the Virginia State Board of Education; and the defendant Waldo C. Miles, individually and in his official capacity as a member of the State board of education, is dismissed as a party hereto.

5. R. P. Eagles, G. L. Crump, C. C. Wells, and C. D. Spencers, are dismissed as party defendants, individually and in their official capacity as members of the school board of Chesterfield County.

6. Preston T. Holmes, George Ray Partin, and Edward A. Mosely, Jr., be, and they are hereby, added as party defendants, individually and in their official capacity as members of the school board of Chesterfield County.

7. H. O. Browning, C. J. Purdy, A. R. Martin, and F. F. Dietsch, be, and they are hereby, dismissed as party defendants, individually and in their official capacity as members of the board of supervisors of Chesterfield County.

8. E. M. O'Neill, A. J. Krepela, and Leo Myers, be, and they are hereby, added as party defendants, individually and in their official capacity as members of the board of supervisors of Chesterfield County.

9. L. R. Shadwell, Edwin H. Ragsdale, and C. Kemper Lorraine, be, and they are hereby, dismissed as party defendants,

individually and in their official capacity as members of the board of supervisors of Henrico County.

10. Eugene T. Rilee, George W. Jinkins, Jr., and Charles W. Johnson, be, and they are hereby, added as party defendants, individually and in their official capacity as members of the board of supervisors of Henrico County.

11. The State Board of Education and the individual members thereof, Dr. Woodrow W. Wilkerson, State Superintendent of public instruction, the school board of Chesterfield County and the individual members thereof, the school board Henrico County and the individual members thereof, the school board of the city of Richmond and the individual members thereof, the city council of the city of Richmond and the individual members thereof, the board of supervisors of Chesterfield County and the individual members thereof, the board of supervisors of Henrico County and the individual members thereof, their officers, agents, servants, employees, attorneys and successors, and all those acting in concert or in participation with them, receiving actual notice of this order, be, and they are hereby, mandatorial enjoined to:

(*a*) Forthwith, and in no event longer than 30 days of this date, take all steps and perform all acts necessary to create a single school division composed of the counties of Chesterfield and Henrico and the city of Richmond, such action to be taken pursuant to section 22–30 of the code of Virginia, 1950, as amended, to the extent that such statute is not inconsistent with this order and the memorandum of the court heretofore referred to.

(*b*) Forthwith, and in any event within 30 days of this order, establish a single school board for the school division created pursuant to subparagraph (*a*) above, said board to consist of nine members unless a lower number, but not fewer than six, be mutually agreed upon by the governing bodies of Henrico, Chesterfield, and Richmond with the approval of the State board of education. The board shall be created in accordance with the provisions of sections 22–100.1, 22–100.3, 22–100.4, 22–100.5, and 22–100.6 of the code of Virginia, 1950, as amended, to the extent that such statutes are not inconsistent with this order or the memorandum heretofore referred to.

(*c*) Take all steps and perform all acts necessary to cause title to all school property, both real and personal, presently owned or hereafter acquired which is devoted to or utilized in the operation of public schools to be transferred to the division school board created in subparagraph (*b*) above. In addition to real and personal property as aforesaid, the school boards and governing bodies of Henrico, Chesterfield, and Richmond shall take such steps as are required to make certain that any other facilities such as administrative offices, warehouse-storage areas, and transportation facilities, either presently utilized or contemplated and planned for future use by the existing separate school boards, will be made available to the division school board created pursuant to subparagraph (*b*) above. Such conveyances, transfers, and allocations of space or other facilities shall become effective as of July 1, 1972, and to the extent applicable, shall be made pursuant to section 22–100.7 of the code of Virginia, 1950, as amended.

(*d*) The Virginia State Board of Education and Dr. Woodrow W. Wilkerson, State superintendent of public instruction, shall within 60 days from the date of this order appoint an acting superintendent and such administrative staff and personnel as may be necessary to organize the school division created in subparagraph (*a*) above, and the defendant school boards of Chesterfield, Henrico, and Richmond shall furnish such personnel and staff as may be requested by the defendant State board of education and the superintendent of public instruction. All expenses incident to the organization and establishment of the school division composed of Richmond, Chesterfield, and Henrico shall be paid by defendants Chesterfield, Henrico, and Richmond on a pro rata basis on enrollment of pupils as of September 1971, or such other basis as may be mutually agreed upon by the division school board created in subparagraph (*b*) above with the approval of the State board of education and the governing bodies of Henrico, Chesterfield, and Richmond.

(*e*) The Virginia State Board of Education and the superintendent of public instruction shall forthwith and in any event within 60 days hereof, promulgate and file with this court rules and regulations covering the financial plan of operation of the schools in the single school division of Richmond, Chesterfield, and Henrico pursuant to section 22–100.8 of the code of Virginia, 1950, as amended, including but not limited to provisions for expenditures for capital outlay purposes, the incurring of indebtedness for the construction of school buildings consistent with section 22–100.9 of the code of Virginia, 1950, as amended, and provisions for the retirement of existing debt service in the separate school divisions.

(*f*) The State board of education and the State superintendent of public instruction shall forthwith and in any event not later than 60 days from the date of this order, file a plan for the organizational structure of the school division created in subparagraph (*a*) above, including but not limited to steps for the unification of personnel policies and procedures now existing in the three separate school divisions.

(*g*) The State board of education and the superintendent of public instruction shall, with the assistance of the acting superintendent appointed pursuant to paragraph (*d*) above and the school board created pursuant to paragraph (*b*) above, take all necessary steps to implement the desegregation plan presented to this court by the school board of the city of Richmond, said plan to be implemented not later than the beginning of the 1972–73 school year and in connection therewith shall:

(1) Modify the plan as presented by making such adjustments necessary by changes in student enrollment,

changes in school attendance areas, new construction or other events occurring subsequent to September 1971. The existing school boards of Chesterfield, Henrico, and Richmond shall provide data and personnel as requested by the State board of education and the superintendent of public instruction to accomplish the foregoing.

(2) Submit to this court within 70 days from the date of this order the modifications required by paragraph *g*(1) above as well as any other modifications, changes, or recommendations, as may be desired by the State board of education, the State superintendent of public instruction, the acting school superintendent, or the school board created pursuant to paragraph (*b*) above.

(*h*) The State board of education and the State superintendent of public instruction shall file with this court within 90 days of the date of this order a detailed plan for the implementation of the desegregation plan for the school division of Richmond, Chesterfield, and Henrico as presented by the Richmond school board and as modified in accordance with paragraphs (*g*) (1) and (2) above, said plan to include:

(1) The projected enrollment and racial composition for each school during the 1972–73 school year;

(2) A summary of the number and racial composition of all professional personnel presently employed by the existing separate school divisions with an appropriate breakdown between classroom instructors, staff personnel assigned to specific schools, and staff personnel assigned to central administrative positions;

(3) After determining the racial composition of the total number of faculty and staff presently assigned to all of the schools of the existing separate divisions, an assignment plan for faculty and staff to insure that each school for the 1972–73 school year will have a racial composition within 5 percentage points thereof;

(4) A plan for the attainment of a comparable ratio as mentioned in subparagraph (3) above for any central administrative staff;

(5) The tentative transportation plan for the school division of Richmond, Chesterfield, and Henrico including a statement as to the adequacy of transportation equipment and facilities presently owned or committed to the existing separate school divisions, and in the event of insufficient equipment or facilities, a plan to acquire within sufficient time for use throughout the 1972–73 school year, sufficient transportation equipment and facilities for the implementation of the aforesaid desegregation plan;

(6) A status report on any proposed school construction including the location of acquired or contemplated school sites;

(7) A summary of those steps proposed to bring about meaningful integration within all schools in the school

division of Richmond, Chesterfield, and Henrico for the 1972–73 school year, including but not limited to plans for in-service training of staff, creation of biracial committees, employment of black counselors in all schools, and plans for biracial extracurricular activities.

(8) If the creation of a single school division required under this order necessitates a reduction in the number of superintendents, principals, teachers, teacher aides, or other professional staff now employed by the three districts involved, and if this reduction will result in the dismissal or demotion of any such staff members, the selection of any staff members to be dismissed or demoted must be made on the basis of objective, nonracial and nonethnic standards from among all the staff members of the single school division including all those presently employed in the separate districts. Within these guidelines, the defendants and the successor division shall avoid any substantially disproportionate reduction or removal of black personnel from positions of control or authority.

(9) Staff members who work directly with children and professional staff who work on the administrative level shall be hired, assigned, promoted, paid, demoted, dismissed, or otherwise treated without regard to race, color, or national origin. There shall, however, be no reduction by the defendants of their successors of their efforts to increase minority group representation among their faculties and professional staffs.

(10) The school board of the single school division shall develop objective, nonracial and nonethnic criteria to be used in the hiring, assigning, promoting, paying, demoting, and dismissing of staff members. These criteria shall be developed and made available for public inspection prior to the single school division's staffing its system for the 1972–73 school year, a copy thereof shall be submitted to the court with a copy to the plaintiffs, and a copy thereof shall be retained by the school division. The school division also shall record its evaluations of staff members under the criteria described above and shall preserve these records for as long as the staff member is employed by the division, and for at least 3 years following the termination of the staff member's employment by the division. The record of such evaluations shall be made available to a dismissed or demoted employee upon request.

(11) "Demotion" as used above includes any reassignment (*a*) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (*b*) which requires a lesser degree of skill than did the assignment he previously held, or (*c*) under which the staff member is asked to teach a subject or grade other than one in which he is certified or one in which he has had substantial experience within a period of 5 years.

(12) The existing school boards of Chesterfield, Henrico, and Richmond shall continue to function and shall continue to have control over the operation of schools within the existing separate school divisions until June 30, 1972, and on July 1, 1972, the division school board created in paragraph (*b*) above shall become the successor board of education to the defendant school boards of Richmond, Henrico, and Chesterfield, assuming all rights, powers, responsibilities, duties, and obligations (including obligations under employment contracts for terms in excess of 1 year) presently held in whole or in part by the existing defendant school boards.

(13) All defendants, individually and in their official capacity, and all officers, agents, servants, employees, attorneys, and successors of the countries of Henrico and Chesterfield and the city of Richmond, and all those acting in concert or in participation with them or receiving actual notice of this order are hereby enjoined from taking any step or action and from permitting, engaging in, giving consent or approval to, or supporting any policy or practice which is inconsistent with or which may delay or prejudice the creation or organization of a school division composed of Richmond, Chesterfield, and Henrico and the effective implementation of the aforementioned desegregation plan at the beginning of the 1972–73 school year.

(14) The Virginia State Board of Education and Dr. Woodrow W. Wilkinson, State superintendent of public instruction, shall within 35 days from this date file with this court a detailed report setting out in detail the steps taken up to that time in conformity with this order.

The clerk shall serve copies of this order on each of the defendants by mailing by certified mail a copy of same to the address of their respective offices.

ROBERT R. MERHIGE, JR.,
U.S. District Judge.

JANUARY 10, 1972.

Part III

OTHER SCHOOL DESEGREGATION CASES

SINGLETON *v.* JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT

419 F.2d 1211 (5th Cir. 1970);

cert. den. 402 U.S. 944 (1970)

U.S. Court of Appeals, 5th Circuit

December 1, 1969

SCHOOL DESEGREGATION CASES

From orders of the U.S. District Court for the Southern District of Mississippi, at Jackson, Dan M. Russell, Jr., J., the U.S. District Court for the Northern District of Mississippi, at Greenville, William C. Keady, chief judge, the U.S. District Court for the Eastern District of Texas, at Tyler, Joe J. Fisher, chief judge, the U.S. District Court for the Northern District of Alabama, at Birmingham, Clarence W. Allgood, J., the U.S. District Court for the Southern District of Alabama, at Mobile, Daniel Holcombe Thomas, chief judge, the U.S. District Court for the Eastern District of Louisiana, at Baton Rouge, E. Gordon West, chief judge, the U.S. District Court for the Western District of Louisiana, at Monroe, Benjamin C. Dawkins, Jr., chief judge, the U.S. District Court for the Eastern District of Louisiana, at New Orleans, Fred J. Cassibry, J., the U.S. District Court for the Southern District of Georgia, at Augusta, Alexander A. Lawrence, J., the U.S. District Court for the Middle District of Georgia, at Macon, William A. Bootle, chief judge, and the U.S. District Court for the Northern District of Florida, at Tallahassee and Gainesville, George Harrold Carswell, J., appeals were taken. The Court of Appeals held, inter alia, that since, pursuant to U.S. Supreme Court decision directing that school districts begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color, it would be possible to merge faculties and staff, transportation, services, athletics and other extracurricular activities during present school term, but difficult to arrange merger of student bodies prior to fall term of 1970, a two-step merger plan would be implemented; one step, including merger of faculties and staff, to be accomplished by February 1, 1970; the other step, including student body merger, to be accomplished by fall term of 1970.

REVERSED IN PART; AFFIRMED IN PART; AND REMANDED

Reuben V. Anderson, Paul Brest, Iris Brest, Fred L. Banks, Jr., Marian E. Wright, Melvyn R. Leventhal, Jackson, Miss., Jack Greenberg, Franklin White, Melvyn Zarr, Norman J. Chachkin, Jonathan Shapiro, New York City, Robert Moore, U.S. Department of Justice, Civil Rights Division, Washington, D.C., for appellants Derek Jerome Singleton and others.

Robert C. Cannada, Thomas H. Watkins, special counsel, A. F. Summer, attorney general, Dugas Shands, assistant attorney general, Jackson, Miss., for appellees Jackson Municipal Separate School District and others.

Jerris Leonard, Assistant Attorney General, David L. Norman, Deputy Assistant Attorney General, John A. Bleveans, David D. Gregory, attorneys, U.S. Department of Justice, Washington, D.C., for the United States in all cases.

Before JOHN R. BROWN, chief judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CARSWELL, and CLARK, circuit judges, en banc.[1]

PER CURIAM

These appeals, all involving school desegregation orders, are consolidated for opinion purposes. They involve, in the main, common questions of law and fact. They were heard en banc on successive days.

Following our determination to consider these cases en banc, the Supreme Court handed down its decision in *Alexander* v. *Holmes County Board of Education* (1969) 396 U.S. 19, 90 S. Ct. 29, 24 L. Ed. 2d 19. That decision supervened all existing authority to the contrary. It sent the doctrine of deliberate speed to its final resting place; 396 U.S. at pp. 19, 20, 21, 90 S. Ct. at pp. 29–30, 24 L. Ed. 2d at p. 21.

The rule of the case is to be found in the direction to this court to issue its order "effective immediately declaring that each of the school districts . . . may no longer operate a dual school system based on race or color, and directing that they begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color." We effectuated this rule and order in *United States* v. *Hinds County School Board* (5 Cir. (1969)), 417 F.2d 852. It must likewise be effectuated in these and all other school cases now being or which are to be considered in this or the district courts of this circuit.

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[1] Judge Wisdom did not participate in Nos. 26285, 28261, 28045, 28350, 28349 and 28361. Judge Ainsworth did not participate in No. 28342. Judge Carswell did not participate in Nos. 27863 and 27983. Judge Clark did not participate in No. 26285.

The tenor of the decision in *Alexander* v. *Holmes County* is to shift the burden from the standpoint of time for converting to unitary school systems. The shift is from a status of litigation to one of unitary operation pending litigation. The new modus operandi is to require immediate operation as unitary systems. Suggested modifications to unitary plans are not to delay implementation. Hearings on requested changes in unitary operating plans may be in order but no delay in conversion may ensue because of the need for modification or hearing.

In *Alexander* v. *Holmes County*, the court had unitary plans available for each of the school districts. In addition, this court, on remand, gave each district a limited time within which to offer its own plan. It was apparent there, as it is here, that converting to a unitary system involved basically the merger of faculty and staff, students, transportation, services, athletic and other extra-curricular school activities. We required that the conversion to unitary systems in those districts take place not later than December 31, 1969. It was the earliest feasible date in the view of the court. *United States* v. *Hinds County*, *supra*. In three of the systems there (Hinds County, Holmes County and Meridian), because of particular logistical difficulties the Office of Education (HEW) had recommended two-step plans. The result was, and the court ordered, that the first step be implemented not later than December 31, 1969, and the other beginning with the fall 1970 school term.

I

Because of *Alexander* v. *Holmes County*, each of the cases here, as will be later discussed, must be considered anew, either in whole or in part, by the district courts. It happens that there are extant unitary plans for some of the school districts here, either Office of Education or school board originated. Some are operating under freedom of choice plans. In no one of the districts has a plan been submitted in light of the precedent of *Alexander* v. *Holmes County*. That case resolves all questions except as to mechanics. The school districts here may no longer operate dual systems and must begin immediately to operate as unitary systems. The focus of the mechanics question is on the accomplishment of the immediacy requirement laid down in *Alexander* v. *Holmes County*.

Despite the absence of plans, it will be possible to merge faculties and staff, transportation, services, athletics and other extra-curricular activities during the present school term. It will be difficult to arrange the merger of student bodies into unitary systems prior to the fall 1970 term in the absence of merger plans. The court has concluded that two-step plans are to be implemented. One step must be accomplished not later than February 1, 1970, and it will include all steps necessary to conversion to a unitary system save the merger of student bodies into unitary systems. The student body merger will constitute the second step and must be accomplished not later than the beginning of the fall term 1970.[2] The district courts, in the respective cases here, are directed to so order and to give first priority to effectuating this requirement.

To this end, the district courts are directed to require the respective school districts, appellees herein, to request the Office of Education (HEW) to prepare plans for the merger of the student bodies into unitary systems. These plans shall be filed with the district courts not later than January 6, 1970, together with such additional plan or modification of the Office of Education plan as the school district may wish to offer. The district court shall enter its final order not later than February 1, 1970, requiring and setting out the details of a plan designed to accomplish a unitary system of pupil attendance with the start of the fall 1970 school term. Such order may include a plan designed by the district court in the absence of the submission of an otherwise satisfactory plan. A copy of such plan as is approved shall be filed by the clerk of the district court with the clerk of this court.[3]

The following provisions are being required as step one in the conversion process. The district courts are directed to make them a part of the orders to be entered and to also give first priority to implementation.

The respective school districts, appellees herein, must take the following action not later than February 1, 1970:

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[2] Many faculty and staff members will be transferred under step one. It will be necessary for final grades to be entered and for other records to be completed, prior to the transfers, by the transferring faculty members and administrators for the partial school year involved. The interim period prior to February 1, 1970, is allowed for this purpose.

The interim period prior to the start of the fall 1970 school term is allowed for arranging the student transfers. Many students must transfer. Buildings will be put to new use. In some instances it may be necessary to transfer equipment, supplies or libraries. School bus routes must be reconstituted. The period allowed is at least adequate for the orderly accomplishment of the task.

[3] In formulating plans, nothing herein intended to prevent the respective school districts or the district court from seeking the counsel and assistance of State departments of education, university schools of education or of others having expertise in the field of education.

It is also to be noted that many problems of a local nature are likely to arise in converting to and maintaining unitary systems. These problems may best be resolved on the community level. The district courts should suggest the advisability of biracial advisory committees to school boards in those districts having no Negro school board members.

DESEGREGATION OF FACULTY AND OTHER STAFF

The school board shall announce and implement the following policies:

1. Effective not later than February 1, 1970, the principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students. For the remainder of the 1969–70 school year the district shall assign the staff described above so that the ratio of Negro to white teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.

   The school district shall, to the extent necessary to carry out this desegregation plan, direct members of its staff as a condition of continued employment to accept new assignments.

2. Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.

3. If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable nondiscriminatory standards from among all the staff of the school district. In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such a reduction, the school board will develop or require the development of nonracial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

"Demotion" as used above includes any reassignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experience within a reasonably current period. In general and depending upon the subject matter involved, 5 years is such a reasonable period.

MAJORITY TO MINORITY TRANSFER POLICY

The school district shall permit a student attending a school in which his race is in the majority to choose to attend another school, where space is available, and where his race is in the minority.

TRANSPORTATION

The transportation system, in those school districts having transportation systems, shall be completely reexamined regularly by the superintendent, his staff, and the school board. Bus routes and the assignment of students to buses will be designed to insure the transportation of all eligible pupils on a nonsegregated and otherwise nondiscriminatory basis.

SCHOOL CONSTRUCTION AND SITE SELECTION

All school construction, school consolidation, and site election (including the location of any temporary classrooms) in the system shall be done in a manner which will prevent the recurrence of the dual school structure once this desegregation plan is implemented.

ATTENDANCE OUSTSIDE SYSTEM OF RESIDENCE

If the school district grants transfers to students living in the district for their attendance at public schools outside the district, or if it permits transfers into the district of students who live outside the district, it shall do so on a nondiscriminatory basis, except that it shall not consent to transfers where the cumulative effect will reduce desegregation in either district or reenforce the dual school system.

See *United States* v. *Hinds County*, *supra*, decided November 6, 1969. The orders there embrace these same requirements.

II

In addition to the foregoing requirements of general applicability, the order of the court which is peculiar to each of the specific cases being considered is as follows:

No. 26285—JACKSON, MISSISSIPPI

This is a freedom of choice system. The issue presented has to do with school building construction. We enjoined the proposed construction pending appeal.

A Federal appellate court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. *Bell* v. *State of Maryland*, 378 U.S. 2268, 84 S. Ct. 1814, 12 L. Ed. 2d 822 (1964). We therefore reverse and remand for compliance with the requirements of *Alexander* v. *Holmes County* and the other provisions and conditions of this order. Our order enjoining the proposed construction pending appeal is continued in effect until such time as the district court has approved a plan for conversion to a unitary school system.

No. 28261—Marshall County

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III

In the event of an appeal or appeals to this court from an order entered as aforesaid in the district courts, such appeal shall be on the original record and the parties are encouraged to appeal on an agreed statement as is provided for in rule 10(d), Federal Rules of Appellate Procedure (FRAP). Pursuant to rule 2, FRAP, the provisions of rule 4(a) as to the time for filing notice of appeal are suspended and it is ordered that any notice of appeal be filed within 15 days of the date of entry of the order appealed from and notices of cross-appeal within 5 days thereafter. The provisions of rule 11 are suspended and it is ordered that the record be transmitted to this court within 15 days after filing of the notice of appeal. The provisions of rule 31 are suspended to the extent that the brief of the appellant shall be filed within 15 days after the date on which the record is filed and the brief of the appellee shall be filed within 10 days after the date on which the brief of appellant is filed. No reply brief shall be filed except upon order of the court. The times set herein may be enlarged by the court upon good cause shown.

The mandate in each of the within matters shall issue forthwith. No stay will be granted pending petition for rehearing or application for certiorari.

Reversed as to all save Mobile and St. John The Baptist Parish; affirmed as to Mobile with direction; affirmed in part and reversed in part as to St. John The Baptist Parish; remanded to the district courts for further proceedings consistent herewith.

KEYES *v.* SCHOOL DISTRICT NO. 1, DENVER

303 F.Supp. 279 (1969)

Vacated and Remanded—August 5, 1969

Suit by schoolchildren to enjoin implementation of resolution of Denver School Board which rescinded previous resolutions pertaining to integration of the schools. On motion for preliminary injunction, the district court, William E. Doyle, J., held that city school board's rescission of four resolutions which required positive integration of school system constituted arbitrary State legislative action which contravened the equal protection clause of the 14th amendment.

Motion granted.

Opinion after remand (D.C., 303 F.Supp. 289)

Barnes and Jensen, by Craig S. Barnes, Gerald L. Jensen, Holland and Hart, by Gordon G. Greiner, Lawrence W. Treece, Robert T. Connery, Denver, Colo., Vilma Martinez Singer, New York City, for *plaintiffs.*

Henry, Cockrell, Quinn and Creighton, by Richard C. Cockrell, Victor Quinn, Thomas E. Creighton, Benjamin L. Craig, Michael Jackson, Denver, Colo., Beirne, Wirthlin and Manley, by Robert E. Manley, Cincinnati, Ohio, for *defendants*, except John H. Amesse, James D. Voorhees, Jr., and Rachel B. Noel, as individuals.

MEMORANDUM OPINION AND ORDER

William E. Doyle, District Judge.

I—Jurisdiction

This is before us on a motion for temporary injunction. Examination of the complaint reveals that jurisdiction is invoked by reason of title 28, U.S.C. 1343(3)(4), which authorizes the court to entertain suits which seek to redress injuries resulting from violations of the Constitution of the United States. Although the Declaratory Judgment Act has been invoked, this does not of itself confer any independent jurdisdiction. The Civil Rights Act is also drawn into play (title 42 U.S.C. secs. 1983, 1985). It is alleged that the State of Colorado, acting through its agents, violated plaintiffs' constitutional rights. By reason of the allegations of the complaint and the facts which have been presented, it is determined that there is subject matter jurisdiction to hear the cause.

The plaintiffs, who are schoolchildren, allege through their parents that their rights have been violated and continue to be violated through acts that have been described. Consequently, they are aggrieved persons. There is no dispute about their identity or their interest in the case, nor is there any question raised as to the propriety of a class action on behalf of all persons similarly situated. Consequently, there does not appear to be any problem about jurisdiction, personal or subject matter, to entertain the cause, both sides have conceded that it is a matter that needs immediate attention and that it should be disposed of without delay.

II—The Issues

The pleadings describe alleged injuries resulting from the plaintiffs having been subjected to unequal treatment with respect to their right to an education. They seek to enjoin the implementation of a resolution of the school board passed on June 9 of this year which would have rescinded previous resolutions which had made some effort to mitigate or reduce segregation which allegedly had existed in schools in the northeast part of Denver. The defendants deny that there has been any actionable segregation. Although no answer has been filed, they maintain that segregation, if any, exists by reason of maintaining neighborhood schools and natural migration, and that no action on their part has brought this about or intensified it. Basically, this is the issue which has been tried here, and has been tried rather extensively.

The complaint herein contains several causes of action and counts. At this stage of the proceedings we are concerned only with the first cause of action and the counts which are related to it. All of these allegations pertain to the rescission of school board resolutions 1520, 1524, and 1531, which resolutions made changes in the attendance areas of certain high schools, junior high schools, and elementary schools in northeast Denver, and undertook to desegregate these schools, all of which had become or were becoming predominantly Negro schools. It is alleged that on June 9, 1969, the newly elected school board, by motion, rescinded all three resolutions. The complaint alleges that the action of the board was in violation of the plaintiffs' constitutional rights—the 14th amendment—and seeks a decree reinstating resolutions 1520, 1524, and 1531.

The motion for preliminary injunction which is now before us seeks to enjoin the implementation of board resolution 1533 which would adopt and follow the policy which would carry out the practices which existed prior to the board's adoption of Resolutions 1520, 1524, and 1531. The temporary injunction seeks maintenance of the status quo and, specifically, an order enjoining the school board from modifying the purchase order for schoolbuses, destroying documents relating or pertaining to the implementation of Resolutions 1520, 1524, and 1531 and, thirdly, from taking any action or making any communications to faculty, staff, parents, or students during the pendency of the suit which would make it impossible or more difficult to proceed with the implementation of Resolutions 1520, 1524, and 1531. The defendants have not filed an answer. However, at the hearing they denied that any of their acts were invalid and generally maintained that they had made good faith efforts to integrate the schools in question to the extent that it was possible to do so considering the geographic circumstances. They further maintained that the segregation, if any, was merely de facto growing out of the neighborhood character of the schools, and that the acts of the school board do not amount to actionable or de jure segregation.

III—The Evidence of the Case

Attention at this hearing has focused primarily on the schools in northeast Denver, and particularly on the area which is commonly called Park Hill. The alleged segregated schools, elementary and junior high schools in this area, have acquired their character as such during the past 10 years. The primary reason for this has been the migration of the Negro community eastward from a confined community surrounding what is commonly called "Five Points." Before 1950 the Negroes all lived in a community bounded roughly by 20th Avenue on the south, 20th Street on the west, York Street on the east and 38th Avenue on the north. The schools in this area were, and are now, largely Negro schools. However, we are not presently concerned with the validity of this condition. During this period the Negro population was relatively small, and this condition had developed over a long period of time. However, by 1960 and, indeed, at the present time this population is sizable. As the population has expanded the move has been to the east, first to Colorado Boulevard, a natural dividing line, and later beyond Colorado Boulevard, but within a narrow corridor—more or less fixed north-south boundaries. The migration caused these areas to become substantially Negro and segregated.

The trend of the population was apparent long before the migration of the Negro population eastward to Colorado Boulevard was completed. Notwithstanding this fact, the Barrett Elementary School was built in the late 1950's for the purpose of serving a residential area west of the school, which area was destined in a short time to become populated by Negro families. When this school was completed and opened, its population was predominantly Negro. In a few years it became overwhelmingly Negro in its composition.

In the early 1960's Colorado Boulevard was somewhat of a dividing line and the area east of Colorado Boulevard was for the most part Anglo. Thus Stedman School, which was a few blocks east of Colorado Boulevard, was almost entirely Anglo, while Barrett was predominantly Negro. The migration soon continued across Colorado Boulevard and within a very short time not only was the Stedman School predominantly Negro, the other elementary schools in that area, including Hallett at 2950 Jasmine Street, Smith at 3590 Jasmine Street, and Phillips at 6550 East 21st Avenue (to a lesser degree) were also predominantly Negro. The single junior high school, Smiley, at 2540 Holly Street, also became predominantly Negro. Since these students attend East High School, this development threatened to result in East becoming a Negro school as well.

It is noteworthy that notwithstanding that Barrett and Stedman Schools were close to one another, no effort was made by the school board to incorporate any part of the Stedman district into Barrett. The latter had been constructed as a small school tailored to accommodate the segregated population west of Colorado Boulevard only. None of Stedman's overcrowded white population were diverted to Barrett, and, of course, none of the Barrett students were diverted to the white Stedman.

It is also noteworthy that Negro children who, prior to the construction of Barrett, attended Park Hill School which had been substantially integrated, were, after the opening of Barrett, required to attend the latter school thus further assuring that Barrett would be black and Park Hill predominantly white.

Notwithstanding the Barrett experience, a recommendation was made in 1962 to construct a junior high school at 32d and Colorado Boulevard near the Barrett school. This project was rejected after much debate and following public protest that it would be a racially segregated junior high school.

After this junior high school experience, a Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools was created. Its mission was to "study and report on the present status of educational opportunity in the Denver public schools, with attention to racial and ethnic factors in the areas of curriculum, instruction, and guidance; pupils and personnel; buildings, equipment, libraries and supplies, administration and organization; school-community relations, and to recommend improvements in any or all of such specific areas." The report of the committee criticized the board's establishing of school boundaries so as to perpetuate existing de facto segregation "and its resultant inequality in the educational opportunity offered." It recommended that the board policy consider racial, ethnic and socioeconomic factors in establishing boundaries and locating new schools so as to minimize the effects of de facto segregation. It also recommended that boundaries be set so that the neighborhood establishing represent a heterogeneous school community.[1]

Following the finding of the Study Committee report, the board adopted policy 5100 which called for changes or adaptations which would result in a more diverse or heterogeneous racial and ethnic school population. However, during the years following the adoption of policy 5100, although there was debate, there was no effective effort in the way of implementation. Finally, another study committee was appointed for the purpose of examining existing conditions and recommending specific procedures and guidelines to be taken. At this time there was a proposal to build an addition to the Hallett School and, indeed, it was built over the protest that it would result in intensified segregation. The final report of the second Study Committee was filed on February 23, 1967. The report of the committee also noticed the intensified segregation in the northeast schools and recommended that there be no more schools constructed in northeast Denver. Finally, on May 16, 1968, the board adopted the so-called Noel resolution. This noted that the continuance of neighborhood schools had resulted in the concentration of minority and ethnic groups and called for the establishment of an integrated school population so as to achieve equality of educational opportunity.

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[1] In consideration of school-community relations, the Report stated:

In its study of the Denver community, the Committee finds that de facto segregation exists in Denver, especially in regard to Negro citizens. Even though the Denver Public Schools have not created this pattern of residential segregation, the concentration of certain racial and ethnic groups in certain parts of the city does impose on the schools the same community pattern of de facto segregation.

The Committee agrees with the statement of the U.S. Supreme Court in 1954 in Brown v. Board of Education that segregated education is inherently unequal education. The Committee further believes that this community pattern of racial and ethnic concentration which produces racially and ethnically concentrated schools adversely affects equal educational opportunity. It further strongly believes that both school and community have a responsibility to minimize the effects of segregation if the principles of the *Declaration of Independence* and the *Constitution* are to be a reality growing out of the daily living experience of all children in the Denver community.

On or about January 30, 1969, following the presentation of a plan of integration by the superintendent of schools, the board adopted Resolution 1520 which made changes in attendance areas of certain secondary schools in the school district, and on March 20, 1969, Resolution 1524, also having to do with secondary schools and junior high schools, was adopted. Resolution 1531, on the other hand sought to change attendance areas of the elementary schools. In essence, each of these resolutions sought to reverse the segregation trend in some of the segregated schools by boundary changes which would have resulted, had they become effective, in segregated schools to spread the Negro populations of these schools to numerous other schools, thereby achieving what has been described as racial balance in all of them so that their predominantly Negro populations would become roughly 20 percent and white students from other areas would produce an Anglo population in each school of about 80 percent. At least preliminary efforts had been made by the superintendent and his staff to implement these resolutions. However, on June 9, 1969, following a school board election and a change in the composition of the board, the resolutions were rescinded following what was regarded as a voter mandate. Two new board members were elected and two who had supported the integration policies were defeated. The rescission was by specific motions, and there followed a new resolution, 1533, which undertook to restore the old order.

IV—Additional Findings

The important facts adduced at the hearing deserve special mention as circumstances which serve to show clear patterns of segregation reinforced by official action, and which also show knowing and purposeful conduct.

1. All of the actions of the school board here under consideration occurred during the last 10 years. Thus, they took place long after the decision of the Supreme Court in *Brown* v. *Board of Education of Topeka* (347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)).
2. The School Board Study Committees of 1964 and 1968 warned the members of the board concerning the segregation trends and strongly recommended maesures which would avoid or remedy these conditions. The recommendations contained in the 1963 report [2] were, for the most part, ignored, and this led to the appointment of a second implementation committee which once again was positive and specific in its recommendations.
3. During the entire decade there was regular debate and although resolutions were adopted, no effective action occurred, and

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[2] Plaintiff's exhibit 20.

many of the actions which were taken had the effect of intensifying rather than alleviating the segregation problem.

4. *Assignment of Teachers.* Schools with predominantly minority student populations were shown to be staffed by a greater proportion of teachers on probationary status, teachers with less than 10 years' experience and minority group teachers than were schools with a predominantly Anglo student population.[3]

The board has been reluctant to place Negro and Hispano teachers in white schools because of concern over a possible lack of acceptance by the white community and because of a fear of lack of support by some faculties and principals.[4] The Special Study Committee on Equality of Education Opportunity in the Denver Public Schools (March 1, 1964) recommended that minority teachers be assigned throughout the system. This recommendation was never adopted by the board.

By established board policy (policy No. 1617A) seniority of service is given consideration in making transfers, and teachers on probationary status are not to be transferred except in unusual situations. Thus, teachers on probation or with less seniority became entrenched in the minority schools where they currently serve.

This tendency to concentrate minority teachers in minority schools has helped to seal off these schools as permanent segregated schools.

5. *Establishment of Barrett School.* Plaintiff's exhibits 40 and 41 show that Barrett was opened in a segregated area in 1960; that it was located with conscious knowledge that it would be a segregated school; that it has remained segregated to the present date; and that the school would have been desegregated under Resolution 1531. At the time Barrett was built Stedman School, in a predominantly white area, and located a few blocks east of Barrett, was operating at approximately 20 percent over capacity. Yet Barrett was built as a relatively small school and was not utilized to relieve the conditions at Stedman.

6. *Boundary changes.* In 1962, Superintendent Oberholtzer recommended certain boundary changes to the board. The board refused to adopt a change which would have affected the overcrowded conditions at Stedman. The failure to make this proposed change tended to "aggravate and intensify the containment of the Negro population in Stedman at that time."[5] Those boundary changes which were made pertained to areas with Negro populations of less than 3 percent. Other boundary changes not only failed to alleviate Negro concentration; they added to it. In some instances the changes resulted in transfer of white students to white schools.

7. *Concentration in existing schools.* In June 1965, the board considered the addition of eight classrooms at Hallett School. Hallett was at the time overcrowded and had a predominantly Negro student population. Objection was made to the additions on the grounds that they would increase segregation at Hallett.[6]

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[3] Plaintiffs' exhibits 92, 93, 94, 96, 8–G, 8–F, 9–G, 9–H.

[4] Plaintiffs' exhibit 20, Pg. D–13.

[5] Transcript, Pp. 180–81.

[6] Transcript, Pg. 37.

The board nevertheless proceeded with the additional classrooms. The additions were built despite paragraph 1b (6) of board policy No. 1222C and paragraph 4 of policy No. 5100, which provided that ethnic and racial characteristics of a school population should be considered in determining boundaries and that steps should be taken to achieve more heterogeneous school populations.

8. *Mobile classroms.* The building of 28 mobile units in the Park Hill area in 1964 (at the time there were only 29 such units in all of Denver) resulted in a further concentration of Negro enrollment in Park Hill schools. The retention of these units on a more or less permanent basis tended to continue this concentration and segregation.

9. *Effect of Resolutions 1520, 1524, and 1531.* Had the rescinded resolutions been implemented, Dr. Bardwell estimated (based on 1968 enrollment figures) that the "segregation index" in senior high schools would have decreased from 50 to 28; that the index in junior high schools would have decreased from 65 to 35; and that the decrease in the index for elementary schools would have been from 60 to 43 which, he testified, would approximately result in desegregation of elementary schools.

10. The above noted board actions must be considered in the light of the trend toward increased segregation in northeast Denver schools (for example, between 1960 and 1966 Stedman increased from 4 percent Negro to 89 percent Negro; in that same period Hallett increased from 1 percent Negro to 75 percent Negro).

11. The climactic and cumulative act of the board was the June 9 rescission of Resolutions 1520, 1524, and 1531. Four members of the board voted to rescind the resolutions and adopted Resolution 1533, which embraced policies in derogation of the previous policies as expressed in the mentioned resolutions. The majority of the board (board members Voorhees, Noel, and Amesse voted against it) acted officially to reject the integration effort and to restore and perpetuate segregation in the area. Although this was carried out in response to what was called a voter mandate, there can be no gainsaying the purpose and effect of the action as one designed to segregate.

We do not find that the purpose here included malicious or odious intent. At the same time, it was action which was taken with knowledge of the consequences, and the consequences were not merely possible, they were substantially certain. Under such conditions the action is unquestionably willful.[7]

V—THE APPLICABLE LAW

The foundation stone in any case involving discrimination in public schools is the Constitution of the United States and, in particular, the equal protection clause of the 14th amendment to the Constitution. That clause, in guaranteeing to every citizen the equal protection of the laws, forbids State action which results in unreasonable classifications and deprivations. It prohibits arbitrary classifications which bear no rational relation to any valid governmental purpose.

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[7] Restatement of Torts, § 500, comments f and g at 1296 (1934).

The history of modern case law dealing with the invalid discrimination resulting from school segregation dates from 1954, the year in which the Supreme Court handed down *Brown* v. *Board of Ed.* (347 U.S. 483, 74 S.Ct. 686). The Supreme Court there held that segregation in public schools violated the equal protection clause. However, the case certainly went much farther than this. The Court plainly stated that segregated schools are incapable of providing quality education and also said that the effect of segregation in the school system was to place an indelible stamp of inferiority on those Negro children who were compelled to attend "Negro" schools. Thus, the clear import of the *Brown* decision is that neither a State nor its agencies may establish, maintain, or lend support to a system of segregated public education. Furthermore, if the State or any of its agencies prior to or after *Brown* take any action which creates or furthers segregation, a positive duty arises to remove the effects of such de jure segregation.

Admittedly, the facts of the case at bar are different from *Brown*, but the legal implications of the *Brown* case are fully applicable here. These legal implications have been considered in two opinions of our court of appeals. The first of these cases, *Downs* v. *Board of Ed.* (336 F.2d 988 (10th Cir. 1964)), dealt with the Kansas City school system. Until 1951 this school system had been segregated by law and, at the time that *Brown* was decided, the schools remained substantially segregated. Thereafter, the school board took affirmative steps to alleviate the situation created by the prior policy of segregated schools. The trial court found that the board had acted in good faith to remove segregation in the school system and that the minimum requirements of *Brown* had been met. The board had also undertaken to change certain school district boundaries and these changes had the effect of aggravating segregation in at least one of the city's junior high schools. The trial court held that the board's action did not violate the 14th amendment since the boundary change was made in good faith and not for the purpose of promoting or maintaining segregation.

In affirming the district court, the court of appeals laid down guiding principles to be applied in future cases. It distinguished two factual situations:

1. Where the school board takes affirmative action which has the effect of promoting or maintaining segregation; and
2. Where because of population shifts and housing patterns certain schools have become segregated—so-called de facto segregation.

As to the former, the court said that it must appear that the board's action not only resulted in aggravating segregation, but also that the board acted purposefully with this object in mind. As to the latter, the court said that the better rule was that there is no affirmative duty to integrate races in the public schools.[8] The trial court in *Downs* had found that the school board in that case had made a good faith attempt to conform to the law. The circuit court was reluctant to overturn these findings since the district court had heard the evidence.

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[8] Whether the Court would now give broad effect to this is, of course, irrelevant in the present case, but in view of later developments in the law, the question arises as to whether it would say the same thing today since the cases which it cited in support of this proposition have been largely overruled. Thus, in United States v. Jefferson County Bd. of Ed., 380 F. 2d 385 (5th Cir. 1967) (en banc), the Fifth Circuit Court of Appeals overruled four of the opinions cited in support of the statement in *Downs* that "the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools * * *." (Evers v. Jackson Municipal Separate

In *Board of Ed. of Oklahoma City Public Schools, etc.* v. *Dowell* (375 F.2d 158 (10th Cir. 1967)), the 10th Circuit Court of Appeals affirmed the decision of the District Court of Oklahoma, which court had ordered the school board of Oklahoma City to undertake a plan for desegregation, which plan had been formulated by experts appointed by the court. Thus, in reality it was the court's plan. Prior to *Brown* the Oklahoma City school system was segregated pursuant to constitutional and statutory mandate. Both the trial court and the 10th circuit read the *Brown* decision as requiring affirmative action to remove segregation which had been purposefully caused by prior actions of the school board. The opinion by Judge Hill saw nothing new in a court of equity taking positive steps to integrate the schools.

It is sufficient to say that we are not here faced with the kind of simple or innocent de facto segregation which was found to exist in *Downs*. We have seen that during the 10-year period preceding the passage of Resolutions 1520, 1524, and 1531, the Denver School Board has carried out a segregation policy. To maintain, encourage and continue segregation in the public schools in the face of the clear mandates of *Brown* v. *Board of Ed.* cannot be considered innocent. The many cases decided subsequent to *Brown*, including our own *Circuit's Board of Ed.* v. *Dowell*, impose an affirmative duty on the school board to take positive steps to remove that segregation which has developed as a result of its prior affirmative acts. In response to this duty, the Denver School Board passed Resolutions 1520, 1524, and 1531. In light of *Brown* and *Dowell*, the effort of the board to renounce this constitutional duty by rescission must be rejected as arbitrary state legislative action.

The defendants have alluded to the fact that Resolution 1533 represents the will of the people, and that any action taken by this court which would adversely affect the resolution would frustrate that will. But as we have seen *Brown* v. *Board of Ed.* and all of the subsequent cases hold that equal protection of the laws is synonymous with the right to equal educational opportunities and that segregated schools can never provide that equality. The constitutional protections afforded by the Bill of Rights and the 14th amendment were designed to protect fundamental rights, not only of the majority but of minorities as well, even against the will of the majority. The effort to accommodate community sentiment or the wishes of a majority of voters, although usually valid and desirable, cannot justify abandonment of our Constitution. *Reitman* v. *Mulkey* (387 U.S. 369, 87 S.Ct. 1627,

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School Dist., 328 F. 2d 408 (5th Cir. 1964); Stell v. Savannah-Chatham County Bd. of Ed., 333 F. 2d 55 (5th Cir. 1964); Boson v. Rippy, 285 F. 2d 43 (5th Cir. 1960); and Avery v. Wichita Falls Independent School Dist., 241 F. 2d 230 (5th Cir. 1956)). The *Jefferson County* opinion states:

> The Court holds that boards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize. (Footnotes omitted).

380 F. 2d at 389.

18 L.Ed.2d 830 (1967)); [9] *Lucas* v. *Forty-Fourth General Assembly* (377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632 (1964)).

It is to be emphasized finally that this present case, except for the presence of clear evidence of purpose manifested by the precipitate rescission, is by no means novel. The right to equality in education has, since *Brown*, become recognized as a sensitive constitutional right. Courts throughout the country have taken positive, affirmative steps in order to uphold these rights. In our own circuit, both the *Downs* and *Dowell* opinions have clearly identified and explained the governing legal principles. In other jurisdictions, U.S. court have granted broad affirmative relief in such situations, including orders requiring the adoption of detailed plans for segregation.[10] In the present case, this court has held only that the Denver School Board may not constitutionally take action which perpetrates segregation, and so it sets no new precedent.

In determining that the plaintiffs are entitled to the preliminary relief sought, we are not to be understood as holding that Resolutions 1520, 1524, and 1531 are exclusive. It is true that the case is extraordinary in that there are only two plans presented, one calling for integration and one for segregation. The status quo has the effect of restoring the integration plan. However, the board is by no means precluded from adopting some other plan embodying the underlying principles of Resolutions 1520, 1524, and 1531.

VI—Conclusion

Under the 14th amendment the plaintiffs, as citizens of the United States, have the right to be protected from official action of State officers which deprives them of equal protection of the laws by segregating them because of their race. The denial of an equal right to education is a deprivation which infringes this constitutional guarantee. The precipitate and unstudied action of four of the members of the board rescinding and nullifying the school integration plan, which plan had been adopted after almost 10 years of debate and study, and the adoption in its place of a substitute plan which would have had the effect of perpetuating school segregation, had not only a chilling effect upon their rights; it had a freezing effect. Under the law of the case, we have no alternative. The action taken must be ruled unconstitutional, and the proposed action must be enjoined.

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[9] In this case, the Supreme Court struck down a California constitutional amendment on the ground that it was not merely a repeal of a positive action encouraging integration, but that the rejection, in effect, authorized discriminattion by turning back to the conditions which existed prior to its adoption. It thus encouraged and in a significant way involved the state in racial discrimination contrary to the Fourteenth Amendment. Hence, it was not an exhibition of complete neutrality.

[10] *See*, e.g., United States v. School Dist. 151, 286 F. Supp. 786 (N.D. Ill.), *aff'd.*, 404 F. 2d 1125 (7th Cir. 1968); Coppedge v. Franklin County Bd. of Ed. 273 F. Supp. 289 (E.D.N. Car.), *aff'd*, 394 F. 2d 410 (4th Cir. 1968); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F. 2d 175 (D. C. Cir 1969); Blocker v. Board of Ed., 226 F. Supp. 208 (E.D.N.Y. 1964); Taylor v. Board of Ed., 191 F. Supp. 181 (S.D.N.Y.), *aff'd*, 294 F. 2d 36 (2d Cir. 1961).

In our own Circuit, sweeping plans for desegregation were formulated by the United States District Court for the Western District of Oklahoma on its own initiative after the school board failed to act, and these plans were approved by the Court of Appeals. Dowell v. School Board of Oklahoma City Public Schools, 244 F. Supp. 971 (W.D.Okl.), *aff'd.*, 375 F. 2d 158 (10th Cir. 1967).

In *Hobson*, Circuit Judge Wright, sitting by assignment in District Court, adopted an intricate and detailed integration plan.

The case is a proper one for injunctive relief because:

1. Plaintiffs have no adequate remedy at law;
2. Plaintiffs would suffer irreparable injury if relief were denied; and
3. Plaintiffs will probably succeed at trial, at least on the cause of action under consideration.

The motion for preliminary injunction is granted.

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303 F.Supp. 289 (1969)

VACATED AND REMANDED—AUGUST 27, 1969

(See 90 S.Ct. 12)

Suit by school children to enjoin implementation of resolution of Denver School Board which rescinded previous resolutions pertaining to integration of the schools. The district court granted the children's motion for preliminary injunction (303 F.Supp. 279), and the city school board appealed. On remand, the district court, William E. Doyle, J., held that where Negro school children's action for preliminary injunction against city school board's implementation of resolution, which would, in effect, defeat segregation of city schools, was brought under statute granting cause of action for deprivation of civil rights rather than under Civil Rights Act of 1964, provision of 1964 act withholding power from courts of the United States to order transportation of pupils from one school to another for purpose of achieving racial balance was not applicable.

Barnes and Jensen, by Craig S. Barnes, Gerald L. Jensen, Holland and Hart, by Gordon G. Greiner, Lawrence W. Treece, Robert T. Connery, Denver, Colo., for *plaintiffs*.

Henry, Cockrell, Quinn and Creighton, by Richard C. Cockrell, Victor Quinn, Thomas E. Creighton, Benjamin L. Craig, Michael Jackson, Denver, Colo., for *defendants*, except John H. Amesse, James D. Voorhees, Jr., and Rachel B. Noel, as *individuals*.

SUPPLEMENTAL FINDINGS, CONCLUSIONS AND TEMPORARY INJUNCTION

William E. Doyle, District Judge.

This case is before the court following remand issued by the U.S. Court of Appeals for the 10th Circuit on August 7, 1969. In its opinion the court of appeals (1) questioned the sufficiency in terms of specificity of our injunctive order, and (2) directed that this court consider title IV, section 407(a) of, the 1964 Civil Rights Act (42 U.S.C. 2000c–6(a)).

A hearing was held on August 7, 1969. The court, having heard the arguments, does hereby issue a more specific injunctive order. The question of the applicability of the above mentioned statute will be considered in a supplemental opinion. Also, the following supplemental findings are added to the oral findings of fact given from the bench on July 23, 1969, and the formal findings of fact contained in this court's opinion issued on the 31st day of July, 1969. The findings hereinafter set forth are directed to the schools which received particular attention at the trial. These findings undertake to describe the special circumstances surrounding these particular schools, and the conclusions which are to be drawn from these findings.

FINDINGS OF FACT

BARRETT ELEMENTARY SCHOOL

Located at East 29th Avenue and Jackson Street

1. Barrett Elementary School was opened in 1960. At that time its student body was 89.6 percent Negro. Presently the racial composition of Barrett is virtually 100 percent minority students (93 percent Negro, 7 percent Hispano). Thus, from the time of its establishment until the present Barrett has always been a segregated school.

2. The average percentage of Negro teachers in elementary schools in School District No. 1 as of September 1968 was 8.5 percent. In Barrett school the percentage of Negro teachers is 52.6 percent. This concentration of Negro teachers in a "Negro" school has further contributed to the categorization of Barret as a segregated school.

3. Between 1950 and 1960 the Negro population, which previously had been concentrated in an area known as "Five Points" began to expand to the east. By 1960 it had moved up to Colorado Boulevard, a natural dividing line. This trend of population was apparent long before the migration of the Negro population eastward to Colorado Boulevard was completed. With full knowledge of this population trend and the fact that Barrett would be a segregated school from the time of its establishment, the board proceeded with and carried into effect the plans for the building of that school.

4. At the time that Barrett was built, the school board created the eastern boundary of the Barrett district along Colorado Boulevard. Thus, the eastern boundary of Barrett school district was made coterminous with the eastern boundary of Negro population movement at that time. This insured the character of Barrett as a segregated school.

5. When Barrett was built, Stedman Elementary School, in a predominantly white area east of Colorado Boulevard a few blocks from the Barrett site, was operating at approximately 20 percent over capacity. Had the eastern boundary of the Barrett district been set to the east of Colorado Boulevard, it would have resulted in some integration of Barrett, while alleviating somewhat the overcrowded conditions at Stedman. By establishing Colorado Boulevard as the eastern boundary of the Barrett district, the board declined to utilize

Barrett to achieve these salutary effects. Furthermore, Barrett was built as a relatively small school (capacity 450) which further prevented its use to relieve overcrowded conditions in the neighboring "white" Stedman. Thus, Barrett was built and opened as a segregated school.

6. In light of the facts as they existed in 1960, there can be no doubt that the positive acts of the board in establishing Barrett and defining its boundaries were the proximate cause of the segregated condition which has existed in that school since its creation, which condition exists at present.

7. The action by the board with respect to the creation of Barrett school was taken with knowledge of the consequences, and these consequences were not merely possible, they were substantially certain. Under such conditions we find that the board acted purposefully to create and maintain segregation at Barrett.

8. The board maintained the segregated condition which it had created at Barrett by failing to take any action to correct it between 1960 and 1969. On April 24, 1969, the board passed Resolution 1531 (operative September 1969) which would have desegregated Barrett by altering school district boundaries. Prior to the passage of Resolution 1531, Barrett was 93 percent Negro and 7 percent Hispano. The racial composition in that school subsequent to implementation of 1531 would have been 73 percent Anglo, 24 percent Negro, 3 percent Hispano.

9. On June 9, 1969, the board, by a 4 to 3 vote, rescinded Resolution 1531 and thereby reaffrmed its prior policy of maintaining and perpetuating segregation at Barrett. Although this was carried out in response to what was called a voter mandate in a school board election, there can be no doubt that the purpose and effect of the action was segregation.

STEDMAN ELEMENTARY SCHOOL

Located at East 29th Avenue and Dexter Street (eight blocks east of Barrett Elementary School)

1. Stedman Elementary School was in 1960 a predominantly "white" school, the student body being only 4 percent Negro. However, as a result of Negro population trends and rigid adherence to school boundaries by the board, by 1962 Stedman was 50–65 percent Negro.

2. In 1962 and for several years prior thereto, Stedman had been overcrowded. Although Stedman could not be considered a segregated school at that time, it was clear by virtue of area population movement that it would become segregated in the near future if immediate steps were not taken to alleviate the overcrowding and stabilize the racial composition. Seven boundary changes were proposed in 1962, three of which woud have relieved overcrowding at Stedman by placing the overflow in Smith, Hallett, and Park Hill, each of which was predominantly Anglo at that time. The board rejected the three Stedman proposals, adopting the other four which pertained to areas with Negro populations of less than 3 percent. By refusing to pass the proposed boundary changes for Stedman, overcrowding was perpetuated and Negro students at that school were prevented from attending nearby "Anglo" schools.

3. By 1963 Stedman was only 18.6 percent Anglo and was still overcrowded. In 1964, the board adopted several boundary changes, two of which had the immediate effect of aggravating the segregated situation at Stedman by transferring predominantly Anglo portions of the Stedman district to other "white" schools in the area. First, a predominantly "white" portion of the Stedman zone was detached to Hallett. Second, the Park Hill-Stedman optional zone was transferred to Park Hill. This area was approximately 96 percent Anglo, and represented that part of the Stedman district with the lowest Negro population. These changes did not significantly reduce overcrowding at Stedman. Rather, they tended to further segregate Stedman by removing the option open to many Anglo students to attend Stedman and preventing Negro students at that school from attending the predominantly Anglo schools in Park Hill.

4. Between May 1964 and May 1965, four mobile units were placed at Stedman to relieve the overcrowded conditions. This, like the previous actions of the board with respect to school boundaries in the Stedman district, had the effect of preserving the Anglo character of certain Park Hill schools and the segregated status of Stedman.

5. As of 1968, Stedman was 94.6 percent Negro and 3.9 percent Anglo. On April 24, 1969, the school board passed Resolution 1531 which was designed to alleviate the containment of Negro students in Stedman which had resulted from the board's conscious efforts to preserve the Anglo character of other Park Hill schools. While 1531 would not have substantially reduced the percentages of Negro students at Stedman, it did provide that an additional 120 Negro children were to be transported from Stedman to predominantly Anglo schools (prior to this time 286 Stedman students were being bused to Force, Schenck, and Denison schools). This would have provided an additional outlet for Negro children at Stedman, enabling them to attend a racially integrated school, and at the same time would have removed the need for the four mobile units. This was designed to relieve and mitigate the intense segregation condition at Stedman as well as to relieve overcrowding.

6. On June 9, 1969, the school board repealed Resolution 1531. The natural and probable consequences of the board's action was to continue the containment of Negro students at Stedman and to reassign Negro children who would have attended an integrated school under Resolution 1531 to the segregated Stedman.

7. The actions of the board with respect to boundary changes, installation of mobile units and repeal of Resolution 1531 shows a continuous affirmative policy designed to isolate Negro children at Stedman and to thereby preserve the "white" character of other Park Hill schools.

PARK HILL AND PHILIPS ELEMENTARY SCHOOLS

Park Hill, located at 5050 East 19th Avenue, eight blocks south and six blocks east of Barrett). Philips, located at 6550 East 21st Avenue (seven blocks south and 25 blocks east of Barrett).

1. In 1960 both Park Hill and Philips Elementary Schools were overwhelmingly Anglo in racial composition. Despite continued Negro population movement into these school districts, Park Hill and Philips presently continue to have a majority of Anglos in the stu-

dent body. This characteristic of both schools is due at least in part to the efforts of the board to prevent the use of Park Hill and especially Philips to relieve the overcrowding at Stedman.

2. By 1968 the racial composition of Park Hill was 71.0 percent Anglo, 23.2 percent Negro and 3.9 percent Hispano. The racial composition of Philips was 55.3 percent Anglo, 36.6 percent Negro and 5.2 percent Hispano. The probable result of maintaining rigid school boundaries in these districts combined with the present trend of Negro population movement would be the transition of Philips and Park Hill into substantially segregated schools.

3. On April 24, 1969, the board passed Resolution 1531 which would have stabilized the racial composition of these two schools (Park Hill would have been stabilized at 79 percent Anglo, 13 percent Negro, 8 percent Hispano; Philips would have been stabilized at 70 percent Anglo, 22 percent Negro, 8 percent Hispano), by a system of transporting some 70 students at Park Hill to Steele and Steck Elementary Schools and 80 students from Philips to Ashley and Palmer Elementary Schools. Also, 80 students would be transported to Philips from Palmer and Montclair Elementary Schools. Resolution 1531 recognized the interrelationship between Philips and Park Hill schools and Stedman, Barrett and Hallett. Thus, even though Philips and Park Hill were not segregated as of 1969, the board felt that effective desegregation could take place at Barrett, Stedman, and Hallett only if other Park Hill area schools were included in a total plan.

4. The school board repealed Resolution 1531 on June 9, 1969. The effect of this action was to restore the original boundaries in the Park Hill and Philips districts, the probable result of which would be a gradual increase of Negro students into Park Hill and Philips schools ultimately approaching a segregated situation. Furthermore, by repeal of 1531 Park Hill and Philips would be reestablished as buffers against the influx of Negro children into other Anglo schools in the Park Hill area. Stedman, Barrett, and Hallet would be returned to their status as overcrowded, segregated schools with no effective outlet provided into predominantly Anglo schools such as Ashley and Palmer.

5. In light of the natural and probable segregative consequences of removing the stabilizing effect of Resolution 1531 on Park Hill and Philips and reestablishing the original district boundaries, the board must be regarded as having acted with a purpose of approving those consequences.

6. These boundary changes for Park Hill and Philips are necessary to the success of the entire plan called for in Resolution 1531.

HALLETT ELEMENTARY SCHOOL

Located at 2950 Jasmine Street (20 blocks east of Barrett)

1. The Negro enrollment at Hallett Elementary School has increased from approximately 1 percent in 1960 to 90 percent in 1968.

2. In 1962, several boundary changes in the Park Hill elementary school districts were proposed and all but three were adopted by the board. One of the three boundary proposals considered but not adopted would have detached part of the Stedman district to Hallett. At that time Stedman was 50–65 percent Negro and was overcrowded, whereas

Hallett was operating under capacity and was approximately 85–95 percent Anglo. The adoption of this boundary change would have relieved some overcrowding at Stedman while increasing Negro enrollment at Hallett. By refusing to adopt the change, Negro students were confined in an overcrowded, segregated school and were denied the opportunity of attending an integrated school.

3. One of the 1962 boundary changes which was adopted assigned the Hallett-Philips optional zone to Philips. This reassigned zone was predominantly Anglo and Philips was at this time virtually 100 percent Anglo. There was no problem of overcrowding at either Hallett or Philips. All that was accomplished was the moving of Anglo students from a school district which would gradually become predominantly Negro to one which has remained predominantly Anglo.

4. By 1964 Hallett was 68.5 percent Anglo. A boundary change in that year detached a predominantly Anglo area from the Stedman district to Hallett, and detached an 80 percent Anglo area from Hallett to Philips. This latter area constituted the section of highest Anglo concentration in the Hallett district. After the 1964 boundary changes, Hallett was only 41.5 percent Anglo. This decrease in Anglo enrollment was due in part to the transfer of the predominantly "white" portion of Hallett's attendance area to Philips.

5. In 1965, four mobile units were constructed at Hallett. Shortly thereafter, the board also approved the construction of additional classrooms. At this time Hallett was approximately 75 percent Negro. The effect of the mobile units and additional classrooms was to solidify segregation at Hallett increasing its capacity to absorb the additional influx of Negro population into the area.

6. Resolution 1531, adopted by the board on April 24, 1969, provided that the superintendent develop and institute plans to make Hallett a demonstration integrated school by use of voluntary transfer of pupils. The proposed plan would have transferred 500 Anglo students to Hallett while transporting 500 Hallett pupils to predominantly Anglo schools. This would have decreased the Negro concentration at Hallett from approximately 90 percent to about 40 percent.

7. Resolution 1533, passed by the board after the rescission of Resolution 1531, also provides for a "voluntary exchange plan" for Hallett. Although this latter resolution does not refer to the purpose of integration, as did Resolution 1531, its intention seems to be substantially similar to that of 1531 with regard to the Hallett situation.

SMILEY JUNIOR HIGH SCHOOL

Located at 2540 Holly Street

1. In 1968 Smiley Junior High School was 23.6 percent Anglo, 71.6 percent Negro and 3.7 percent Hispano. The elementary school feeders for Smiley are Hallett (10.1 percent Anglo, 84.4 percent Negro, 3.7 percent Hispano); Park Hill (71 percent Anglo, 23.2 percent Negro, 3.9 percent Hispano); Smith (2.8 percent Anglo, 94.9 percent Negro, 1.6 percent Hispano); Philips (55.3 percent Anglo, 36.6 percent Negro, 5.2 percent Hispano); Stedman (3.9 percent Anglo, 92.4 percent Negro, 2.9 percent Hispano); Ashley (85.8 percent Anglo, 6.4 percent Negro, 5.8 percent Hispano); and Harrington (5.0 percent Anglo, 77.7 percent Negro, 15.2 percent Hispano). Because of Negro population move-

ment into this area, it is substantially certain that continuance of the boundaries as reestablished by repeal of Resolutions 1520 and 1524 will result in Smiley becoming almost completely Negro in the future.

2. Smiley has the scond highest number of minority teachers of any junior high school in the city. There are 23 Negro and Hispano teachers at Smiley, while no other junior high school, with the exception of Cole, has more than six teachers from racial minority groups.

3. In light of the racial composition of the Smiley student body and faculty in 1968, the racial composition of the Smiley feeders, and Negro population movement into the area, we find that in 1968 Smiley was a segregated school.

4. In 1969 the school board undertook to correct the segregated situation at Smiley by the adoption of Resolutions 1520 and 1524. These resolutions were designed to desegregate Smiley by a substantial alteration of junior high school boundary lines. Had the resolutions been implemented, the racial composition of Smiley would have been 72 percent Anglo, 23 percent Negro, and 5 percent Hispano.

5. On June 9, 1969, the board repealed Resolutions 1520 and 1524. The effect of this repeal was to reestablish Smiley as a segregated school by affirmative board action. At the time of the repeal, it was certain that such action would perpetuate the racial composition of Smiley at over 75 percent minority and that future Negro population movement would ultimately increase this percentage. Thus, the board acted with full knowledge of exactly what the consequences of the repeal would be. We, therefore, find that the action of the board in rescinding resolutions 1520 and 1524 was willful as to its effect on Smiley.

EAST HIGH SCHOOL

Located at 1545 Detroit Street

1. Before passage of Resolution 1520, East High School was approximately 54 percent Anglo, 40 percent Negro, and 7 percent Hispano. Resolution 1520 would have reduced the racial minority enrollment at East to 32 percent. Neither before nor after the passage of 1520 could East be considered a segregated school.

2. The boundary changes embodied in Resolution 1520, 1524, and 1531 would have indirectly affected the racial composition of East through changes in East's feeder schools. Recession of these resolutions might, through the feeder system, result in a segregated situation at East in the future.

Summary of Findings

All of the elementary schools discussed in the supplemental findings set forth above are located in the Park Hill area. There is a high degree of interrelationship among these schools, so that any action by the board affecting the racial composition of one would almost certainly have an effect on the others. Furthermore, since all of these elementary schools operate as feeders for Smiley Junior High School (with the exception of Barrett), any factors affecting the racial composition of the elementary schools will also have a similar effect on Smiley. It is significant to note that board actions between 1960 and 1969, such as the 1962 and 1964 boundary changes, dealt with the entire Park Hill area and had some effect on each school in that section of the city. Thus, the board itself has continuously recognized the interrelationship of schools in northeast Denver.

Between 1960 and 1969 the board's policies with respect to these northeast Denver schools show an undeviating purpose to isolate Negro students first in Barrett, and later in Stedman and Hallett while preserving the Anglo character of schools such as Philips and Park Hill. The ultimate effect of the board's actions and policies in the face of a steady influx of Negro families into the area was to create and maintain segregated situations at Barrett, Stedman, and Hallett which ultimately led to a substantially segregated situation at Smiley.

In adopting Resolutions 1520, 1524, and 1531, the board recognized its constitutional responsibility to desegregate schools in northeast Denver. These resolutions were adopted by a 5 to 2 majority following the recommendations of both the Special Study Committee created in 1962 and a second committee created in 1966, and recommendations contained in the report of Dr. Gilberts and the board staff submitted in October 1968. The reports of the 1962 and 1966 committees made clear that the continued rigid adherence to the established school boundary lines had led to segregation in several Park Hill schools. These resolutions constituted legitimate legislative action designed to remove the segregation in Park Hill schools by means which were both moderate and reasonable in light of existing conditions.

Resolutions 1520, 1524, and 1531 were designed to relieve segregation in Barrett, Stedman, Hallett, and Smiley by altering school district boundaries. Among other things these resolutions would have transferred heavily concentrated Negro portions of the Barrett, Park Hill, Philips, and Smiley districts to predominantly Anglo schools, while transporting a substantial number of Anglo students to the segregated schools. Segregation at Hallett and Stedman was to be relieved by a vigorous policy of voluntary bussing. Although at the time these resolutions were passed Philips and Park Hill schools were not segregated, the board recognized that they were key elements in dealing with the interrelated situation in northeast Denver and that any overall scheme for desegregating Barrett, Hallett, Stedman, and Smiley would necessarily require affirmative action with respect to Park Hill and Philips.

On June 9, 1969, the board rescinded Resolutions 1520, 1524, and 1531. This action was taken with little study and was not justified in terms of educational opportunity, educational quality, or other legitimate factors. The only stated purpose for the rescission was that of keeping faith with the will of the majority of the electorate.

The effect of the rescission was to restore and perpetuate the status quo as it existed in northeast Denver prior to the passage of Resolutions 1520, 1524, and 1531. This status quo was one of segregation at Barrett, Hallett, Stedman, and Smiley. As a replacement for proposals embodied in Resolutions 1520, 1524, and 1531, the board adopted Resolution 1533 which in essence provides for desegregation on a voluntary basis, a program which has been unsuccessful and which furnishes little promise.

CONCLUSIONS OF LAW

1. The policies and actions of the board prior to the adoption of Resolutions 1520, 1524, and 1531, which conduct is specifically described in the foregoing findings, constitute de jure segregation.

2. The adoption of Resolutions 1520, 1524, and 1531 was a bona fide attempt of the board to recognize the constitutional rights of the persons affected by the prior segregation.

3. The rescission of Resolutions 1520, 1524, and 1531 was a legislative act which had for its purpose restoration of the old status quo and was designed to perpetuate segregation in the affected area. This act in and of itself was an act of de jure segregation. It was unconstitutional and void.

4. Section 407(a) of the Civil Rights Act of 1964, title 42 U.S.C. 2000c–6(a) has been fully considered. It does not apply to a private civil rights action asserting violation of the Constitution. A supplemental opinion will expound the reasons in support of this conclusion.

PRELIMINARY INJUNCTION

This matter having come on for hearing upon remand by the Court of Appeals for the 10th Circuit on the motion of plaintiffs for a preliminary injunction, and the court having heard the testimony of the witnesses, having reviewed and considered the exhibits in evidence herein, and having heard the statements of counsel:

The court finds that:

> 1. The court has jurisdiction over the subject matter of this action under 28 U.S.C. 1343(3) and 1343(4). This is a civil action authorized by law and arising under title 42 U.S.C. 1983 and the 14th amendment of the Constitution of the United States;
>
> 2. The court has jurisdiction over the parties herein;
>
> 3. Plaintiffs and the classes which they represent have no adequate remedy at law;
>
> 4. Unless this preliminary injunction issues, plaintiffs and the classes which they represent will suffer irreparable injury;
>
> 5. Plaintiffs and their classes have demonstrated a reasonable probability that they will ultimately prevail upon a full trial of the merits herein.

Based upon the foregoing findings together with those contained in the opinion heretofore rendered it is

> Ordered, adjudged, and decreed that the motion for a temporary injunction should be and the same is hereby granted to the following extent:
>
> > The defendants, their agents and servants are enjoined and restrained, during the pendency of this action, from any conduct which would modify the status quo as it existed prior to June 9, 1969, in respect to acquisition of

> equipment, destruction or relocation of documents, writings and memoranda, and are further enjoined and restrained from implementing Resolution 1533, insofar as that resolution is an integral part of the rescission of Resolutions 1520, 1524, and 1531, and would seek to restore the segregated conditions which existed prior to the adoption of Resolutions 1520, 1524, and 1531.

The defendants, their agents, and servants are further ordered to make effective the following integration policies:

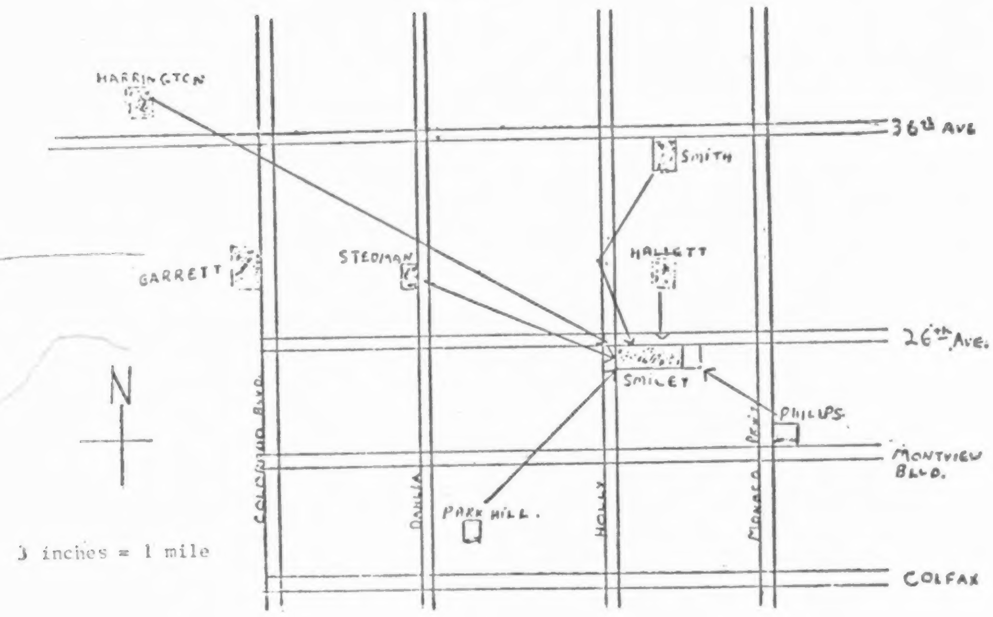
> Resolution 1520 insofar as it applies to Smiley Junior High School (specifically, paragraphs 6 and 7 of the boundary changes embodied in the said Resolution 1520);
>
> Resolution 1524 insofar as it applies to Smiley Junior High School (specifically, paragraphs 1 through 9, inclusive, of the boundary changes embodied in Resolution 1524) (paragraphs 8 and 9 being necessary to the desegregation of Smiley Junior High School). Paragraphs A, B, C, and D of Resolution 1524, which deal with Cole Junior High School, are not here considered, but nothing herein contained is intended to prevent the implementation of those boundary changes. Ruling on these changes is reserved until the trial.
>
> Resolution 1531 insofar as it applies to boundary changes concerning Barrett, Park Hill, and Philips Elementary Schools, and insofar as it directs the superintendent to establish Hallett Elementary School as a demonstration integrated school through voluntary transportation and to continue the practice of transporting students from Stedman Elementary School to relieve overcrowding and to permit the removal of mobile classroom units at that school.
>
> Resolutions 1520, 1524, and 1531 do not expressly call for compulsory transportation; however, the board has had for many years and now has a policy of transporting students who live a certain distance from their schools. Such transportation is probably necessary in order to carry out this decree, but nothing in this order shall be construed to require the board to use such transportation if it can be dispensed with.

Nothing in this order shall prevent the school board from proposing and submitting to this court any other plan for integration.

Rulings concerning East High School and Cole Junior High School are hereby reserved pending consideration of this action at the trial on the merits.

This temporary injunction shall continue during the pendency of this suit and until the action is tried on its merits.

APPENDIX A



OPINION

Applicability of Section 407(a) of the Civil Rights Act of 1964

The Court of Appeals for the 10th Circuit has remanded this case in part for this court's prior determination of the applicability and effect of section 407(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000c–6(a)), which section contains the following proviso:

> . . . provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

We have considered the arguments of counsel, both oral and in briefs. We conclude that the above proviso does not limit the power of this court to direct the school board to implement Resolutions 1520, 1524, and 1531 to the extent ordered.

Section 407(a) refers to actions brought by the Attorney General of the United States under the authority granted him by that section. The proviso appears in this context, and thus on its face does not apply to a case such as this, which is not brought by the Attorney General. Defendants call our attention to a comment made by then Senator Humphrey during congressional debate on the act to the effect that the proviso applies to the entire 1964 Civil Rights Act. Assuming that construction to be correct, the instant case is not brought under the 1964 Civil Rights Act but rather under 28 U.S.C. 1343 and 42 U.S.C. 1983.

The legislative history of section 407(a) indicates that the proviso meant only that Congress was not taking a position on the question of the propriety of transportation to achieve racial balance in a case of de facto segregation. See *United States* v. *Jefferson County Bd. of Ed.* (372 F. 2d 836, 880 (5th Cir. 1966), aff'd on rehearing with order modified, (380 F. 2d 385 5th Cir. 1967) (en banc).

We have concluded that the instant case is one in which the board has actively contributed to the segregated conditions found to exist. The act applies, if at all, to a de facto segregation situation. The Court of Appeals for the Seventh Circuit made this distinction in *United States* v. *School District 151 of Cook County, Illinois* (404 F. 2d 1125 (7th Cir. 1968)), where it was held that the proviso in section 407(a) had no application where transportation was "not done to achieve racial balance, although that may be a result, but to counteract the legacy left by the board's history of discrimination." (404 F. 2d at 1130.) Counteracting a legacy is precisely what the order in the instant case is intended to do.

The language of the proviso indicates that its purpose was to prevent the implication that section 407(a) enlarged the powers of the Federal courts. The proviso states that the section grants a court no power to order transportation to achieve racial balance, nor does the section "otherwise enlarge the existing power of the court to insure compliance with constitutional standards." The equitable powers of the courts in directing compliance with constitutional mandates exist independent of the 1964 Civil Rights Act. *United States* v. *Jefferson County Bd. of Ed.* (372 F. 2d 836, 880 (5th Cir. 1966)). The proviso merely explains that section 407(a) is not to be construed to enlarge the powers of the courts; it does not limit those powers.

It would be inconsistent to construe the proviso as a limitation on the power of the courts to correct a deprivation of rights which section 407(a) itself is intended to remedy. The congressional policy behind the 1964 act should not be diluted by such a construction.

In *United States* v. *School District 151 of Cook County, Illinois* (286 F.Supp. 786 (N.D.Ill. 1968)), the district court considered the instant question and concluded:

> That provision of 42 U.S.C. 2000c–6 which withholds from the courts the power to require transportation of pupils to overcome racial imbalance in public schools must be construed to relate to so-called de facto or adventitious segregation. It is inapplicable where, as here, the existing segregation of pupils and teachers is inseparable from the practices and policies of the defendants.
> (286 F. Supp. at 799.)

In affirming this construction of the statute the Court of Appeals for the Seventh Circuit used the following strong language:

> Defendants next contend that they have no constitutional duty to bus pupils, in the district, to achieve a racial balance. It is true that 42 U.S.C. 2000c–6 withholds power from officials and courts of the United States to order transportation of pupils from one school to another for the purpose of achieving racial balance. However, this question is not before us.

> Although we recognize that past residential segregation itself, in the district, severely unbalanced racially the school population, the district court's judgment is directed at the unlawful segregation of Negro pupils from their white counterparts which is a direct result of the board's discriminatory action. Therefore, the district court's order is directed at eliminating the school segregation that it found to be unconstitutional, by means of a plan which to some extent will distribute pupils throughout the district, presumably by bus. This is not done to achieve racial balance, although that may be a result, but to counteract the legacy left by the board's history of discrimination.
>
> The Constitution forbids the enforcement by the Illinois School District of segregation of Negroes from whites merely because they are Negroes. The congressional withholding of the power of courts in section 2000c–6 cannot be interpreted to frustrate the constitutional prohibition. The order here does not direct that a mere imbalance of Negro and white pupils be corrected. It is based on findings of unconstitutional, purposeful segregation of Negroes, and it directs defendants to adopt a plan to eliminate segregation and refrain from the unlawful conduct that produced it.
>
> *United States* v. *School District 151 of Cook County, Illinois* (404 F. 2d 1125, 1130 (7th Cir. 1968)).

Judge Wisdom, writing for the Court of Appeals for the Fifth Circuit in the *Jefferson County* case, also considered the applicability of the statute to a de jure case and determined that it did not apply.

The above are the sum total of court decisions on the subject. However, they dispel any doubt as to its applicability.

We add that in reevaluating the case in light of the statute and in reconsidering Resolutions 1520, 1524, and 1531, we determined that the effort in 1520 to desegregate East High School was not within the ambit of a preliminary injunction either because of the statute or for the equally good reason that the evidence as of now fails to disclose a condition at East which merits a preliminary injunction.

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313 F. Supp. 61 (1970)

Action to eliminate school segregation. The district court, William E. Doyle, J., held that if school board chooses not to take positive steps to alleviate de facto segregation, it must as minimum insure that its schools offer equal educational opportunity, and that evidence established that equal educational opportunity is not being provided at segregated schools within school district.

Order accordingly.

See also D.C. 313 F.Supp. 90.

Barnes & Jensen, by Craig S. Barnes, Holland & Hart, by Gordon G. Greiner, Denver, Colo., Conrad K. Harper, New York City, for plaintiffs.

Wood, Ris & Hames, by William K. Ris, Henry, Cockrell, Quinn & Creighton, by Thomas E. Creighton, Benjamin L. Craig, Michael Jackson, Denver, Colo., for *defendants*, except John H. Amesse, James D. Voorhees, Jr., and Rachel B. Noel, as *individuals*.

Charles F. Brega, Robert E. Temmer, Denver, Colo., for *intervening defendants*.

MEMORANDUM OPINION AND ORDER

William E. Doyle, district judge.

This is an action in which plaintiffs, parents of children attending Denver public schools, sue individually and on behalf of their minor children. It is also brought on behalf of a class and has proceeded as a rule 23 class action.

The complaint contains numerous causes of action and counts, but essentially it is complained that:

1. The Board of Education for School District No. 1, Denver, unconstitutionally rescinded certain resolutions which were designed to desegregate specific schools within the district;
2. The named defendants have created and/or maintained segregated student bodies and faculties in many of the schools in school district No. 1;
3. The said school district has provided an unequal educational opportunity to students attending segregated schools within the district.

Plaintiffs pray for a declaratory judgment that the above acts are unconstitutional and also seek broad injunctive relief prohibiting the defendants from continuing their prior policies and requiring them to remove the effects of their unconstitutional acts.

In July 1969, an extensive trial was had on plaintiffs' motion for a preliminary injunction as to their first claim for relief, which claim alleged that the rescission of the remedial school board Resolutions 1520, 1524, and 1531 was an unconstitutional act. This court held that this attempted rescission was in fact unconstitutional, and ordered that specified portions of Resolutions 1520, 1524, and 1531 be effectuated pending full trial on the merits. *Keyes* v. *School District No. 1, Denver, Colo.* (303 F. Supp. 279 (D.Colo.)), Supplemental Findings and Conclusions (303 F.Supp. 289 (D.Colo. 1969)).

In February 1970, the case was tried on its merits. The plaintiffs, the defendants, and the intervening defendants were fully heard. This was a trial which continued for 14 trial days. It produced over 2,000 pages of testimony and several hundred exhibits. Thus, the case has been fully tried with the exception of submission by the parties of tangible plans. This phase of the case was deferred pending decision on the issues involving alleged discrimination.

Plaintiffs' first claim for relief deals solely with the purpose and effect of the rescission of Resolutions 1520, 1524, and 1531. Plaintiffs' second claim for relief consists of three counts.[1] The first count of the second claim alleges that the board of education has purposely created and/or maintained racial segregation in certain schools within the district through boundary changes, school site selection, and the maintenance of the neighborhood school policy. The second count alleges that the segregated schools within the district are grossly inferior and provide an unequal educational opportunity for minority students; that these schools do not even meet the separate but equal standard of *Plessy* v. *Ferguson* and that the board is obligated to remedy this inequality regardless of its cause.

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[1] The plaintiffs' fourth count of the second claim for relief, based upon maintenance of a "track system," has been abandoned.

Finally, plaintiffs contend that several schools were created and/or maintained as segregated schools by actions of the board, and that regardless of purpose or intent these acts are unconstitutional. We will deal first with the schools which were the subject of the preliminary hearing, considering the explanatory evidence offered at trial. Secondly, we will consider the evidence which has been offered relative to segregation and discriminatory educational opportunity in the core city schools and, finally, we will discuss possible remedies.

I

Plaintiffs' first claim for relief alleges that the rescission of school board Resolutions 1520, 1524, and 1531 was unconstitutional because its purpose and effect was to perpetuate racial segregation in the affected schools. This claim for relief was the subject of the hearing on plaintiffs' motion for preliminary injunction.

Resolutions 1520, 1524, and 1531, promulgated in 1969, were designed to relieve segregation and the tendency toward segregation in schools located in the Park Hill area of northeast Denver. These schools include Barrett, Stedman, Hallett, Smith, Phillips, and Park Hill Elementary Schools; Smiley and Cole Junior High Schools; and East High School.

The evidence presented at the preliminary hearing has been fully incorporated in the present record. We deem it unnecessary to describe it in detail since it is fully set forth in 303 F.Supp. 279, 289. A recap will, however, serve to bring those proceedings into context.

Prior to 1950, the Negro population of Denver was concentrated in a portion of the city known as Five Points, which is located west of Park Hill. Beginning in 1950, the Negro population began an eastward migration which, by 1960, had reached Colorado Boulevard, a natural dividing line. Since 1960, this migration has extended east of Colorado Boulevard into Park Hill. It is the acts of the defendants, taken in the face of this population movement, which plaintiffs contend created the de jure segregation complained of in the first claim for relief.

Barrett Elementary School was opened in 1960 at East 29th Avenue between Jackson Street and Colorado Boulevard. The site selected for Barrett, along with the size of the school and its established boundary lines insured that it would be a segregated school from the date of its opening.[2] From these and other facts, we concluded at the preliminary hearing, and we now affirm that holding, that the school board intended to create Barrett as a segregated school and prevent Negro children from attending the predominantly Anglo schools east of Colorado Boulevard.

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[2] When Barrett opened in 1960, its student body was 89.6 percent Negro.

At trial (on the merits) defendants attempted to justify Barrett on the ground that until 1964 the board maintained a racially neutral policy. Racial and ethnic data were not maintained by the district, and race was not considered as a factor in any decision. Defendants furthe stated that:

1. The Barrett site had been owned by the district since 1949 and a school was needed in that general vicinity;
2. Colorado Boulevard was established as the eastern boundary of the Barrett attendance zone because it was a six-lane highway and would have been a safety hazard were children required to cross it; and
3. Barrett was built relatively small because its main function was to relieve overcrowding in existing schools rather than to accommodate any significant projected increase in area population.

The above factors fail to provide a basis for inferring that a justifiably rational purpose existed for the action taken with respect to Barrett. First, the district owned other sites east of Colorado Boulevard.[3] Had a school been built on one of these sites, it would have not only served the Barrett area, it would also have been integrated. Second, the fact that in 1960 many elementary school subdistricts included areas on both sides of busy thoroughfares indicates that safety was not a primary factor in setting school boundaries.[4] Third, because of Barrett's small size and the location of its subdistrict boundaries, Barrett relieved overcrowding only at the two predominantly Negro elementary schools west of Colorado Boulevard while affording no relief to the overcrowded Anglo Stedman Elementary School eight blocks east of the Barrett site. Finally, at the time the decision to build Barrett at 29th and Jackson was made public, a large portion of the Negro community opposed the plan on the ground that Barrett would clearly be a segregated school. This opposition was made known to the board, and, thus, the school board cannot now claim that it was uninformed as to the racial consequences of its decisions. Indeed, at that time it was the view of the school administration that it was precluded from taking action which would have an integrating effect.

Between 1960 and 1965, several boundary changes were made in the Park Hill area and mobile units were employed in some Park Hill schools to relieve overcrowding.[5] The effect of these various acts on the racial composition of Park Hill schools was identical. Each tended to isolate and concentrate Negro students in those schools which had become segregated in the wake of Negro population influx into Park

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[3] Dr. Oberholtzer testified that at the time Barrett was built, the School District also owned sites at 35th and Dahlia and 36th and Jasmine (Tr. pg. 2084).

[4] For example, in 1960, the attendance areas of the following elementary schools included areas on both sides of the indicated thoroughfares: Teller and Steck (Colorado Blvd.): Albion, Park Hill, Teller, Stevens, Wyman, Emerson, Evans, Greenlee, Cheltenham, and Colfax (Colfax Ave.); Crofton and Ebert (Broadway); Columbian, Cheltenham, Eagleton and Barnum (Federal Blvd.). Furthermore, it was the policy of the Board to place an elementary school at the center of its attendance area wherever possible. This policy was clearly ignored in the case of Barrett.

[5] The 1962 and 1964 boundary changes affected Stedman, Hallett, and Phillips schools. Mobile units were added to Stedman in 1964 and 1965 and to Hallett in 1965. For a more complete discussion as to the consequences of these boundary changes and mobile units see our opinions on plaintiffs' motion for preliminary injunction, reported at 303 F.Supp. 279 and 303 F.Supp. 289.

Hill while maintaining for as long as possible the Anglo status of those Park Hill schools which still remained predominantly white. From this uniform pattern we concluded that the school board knew the consequences and intended or at least approved of the resultant racial concentrations. We find nothing in the evidence presented at the trial which detracts from this conclusion.

As noted in our former opinion, in 1962 a Special Study Committee on Equality of Educational Opportunity in the Denver Public Schools (Voorhees committee) was created. Following a thorough study, the committee recommended that the school board consider racial, ethnic, and socioeconomic factors in establishing boundaries and locating new schools, and that boundaries be set so as to establish heterogeneous school communities. Pursuant to this recommendation, the board adopted policy 5100, which called for changes or adaptations which would result in a more diverse or heterogeneous racial and ethnic school population.

A second study committee (Berge committee) was established in 1966 to examine the policies of the board with respect to the location of new schools in northeast Denver and to suggest changes which would lead to integration of student population in Denver schools. This committee recommended that no new schools be built in northeast Denver; that a cultural arts center be established which would be attended by students from various schools on a half-day basis once or twice a week; that educational centers be created; and that a superior school program be initiated for Smiley and Baker Junior High Schools.

After more than 6 years of studying and discussing these committee reports and recommendations, the board in 1968 passed the "Noel Resolution" (Resolution 1490). The "Noel Resolution" noted that policy 5100 recognized that continuation of neighborhood schools had resulted in the concentration of minority racial and ethnic groups in some schools within the district and that these schools provided an unequal educational opportunity. The resolution directed the superintendent of schools to submit to the board a comprehensive plan for the integration of the Denver public schools.

Pursuant to the "Noel Resolution's" directive, the superintendent submitted a report entitled "Planning Quality Education—A Proposal for Integrating the Denver Public Schools." Between January and April 1969, the board studied the superintendent's report and passed three resolutions—1520, 1524, and 1531. These resolutions were the product of intense study and discussion and were developed only after considering some 14 alternative plans. Basically, their purpose was to eliminate segregation in the Negro schools in Park Hill while stabilizing the racial composition of schools in transition. Thus, these resolutions constituted the first acts of departure from the board's prior undeviating policy of refusing to take any positive action which would bring about integration of the Park Hill schools.[6]

In May 1969, a school board election was held. Much of the campaign revolved around Resolutions 1520, 1524, and 1531, especially those portions which called for mandatory bussing to relieve segregation. The two candidates who had pledged to rescind Resolutions 1520, 1524, and 1531 were elected. On June 9, 1969, the three resolutions were rescinded and in their stead the board passed Resolution 1533, which sought to achieve desegregation on a voluntary basis.[7] The rescissions were effectuated with little study and were justified only as a response to the community sentiment expressed in the school board election.

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[6] To be sure, the Board had adopted statements of policy, such as Policy 5100, suggesting that it had abandoned its prior philosophy. However, Resolutions 1520, 1524 and 1531 marked the first time the Board had backed up earlier policy statements with affirmative action.

We concluded at the hearing on preliminary injunction that the adoption of Resolutions 1520, 1524, and 1531 was a "bona fide attempt of the board to recognize the constitutional rights of the persons affected by the prior segregation" (303 F. Supp. at 295). We further concluded, on the other hand, that the act of the board repudiating these salutary policies was a legislative act and one of de jure segregation.

> The rescission of Resolutions 1520, 1524, and 1531 was a legislative act which had for its purpose restoration of the old status quo and was designed to perpetuate segregation in the affected area. This act in and of itself was an act of de jure segregation. It was unconstitutional and void.
> (303 F. Supp. at 295.)

At trial defendants claimed that the three resolutions had not been implemented at the time of the rescission, and thus in effect that no rights had ever vested under them. Yet the only apparent purpose of the rescission was to maintain a segregated condition at those schools which, but for the rescission, would have been afforded considerable relief. True, the resolutions had not been carried out, but extensive preparations were in progress. In any event, this cannot be made to turn on any property right analogy. Plaintiffs were deprived of a right to seek and possibly to attain equality.

Our preliminary injunction ordered full implementation of Resolutions 1520, 1524, and 1531, except to the extent that the resolutions apply to East High School and Cole Junior High School. We now hold that the rescission as it applied to East and Cole was also unconstitutional. The school board recognized that East High School contained growing numbers of minority pupils and that this rapid advance toward segregation threatened the high quality of education which had always been characteristic of East High School. It was, therefore, considered desirable to reduce the number of minority students at East and to stabilize the racial composition therein.[8] Although East may not now be a segregated school, it is unquestionably a school in transition. Left alone it will quickly become segregated. The school board, with the passage of Resolution 1520, was administering preventive justice. It was making a reasonable and good faith effort to prevent East from becoming a segregated school.

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[7] Resolution 1533 provided for a voluntary exchange program at Hallett Elementary School on a reciprocal basis, i.e., a volunteering pupil from Hallett could transfer to another school if a pupil from that school would volunteer to attend Hallett. The Resolution also called for the transfer of 120 Stedman students, on a voluntary basis, to other elementary schools where space was available.

[8] Prior to the passage of Resolution 1520 the racial composition at East was approximately 54 percent Anglo, 40 percent Negro and 7 percent Hispano. The effect of the resolution would be to reduce minority enrollment at East to 32 percent.

Even though the racial composition at Cole Junior High School was not significantly changed by Resolution 1524, the resolution did reduce the pupil membership at that school by 275 students. The purpose of this change was to decrease the pupil-teacher ratio at Cole and to make room for a number of special programs to be instituted there. This was also a good faith effort by the board to improve the quality of education at the predominantly Negro Cole. The action of the board in aborting and frustrating this effort cannot stand.

We conclude then that the effect of the rescission of Resolution 1520 at East High was to allow the trend toward segregation at East to continue unabated. The rescission of Resolution 1524 as applied to Cole Junior High was an action taken which had the effect of frustrating an effort at Cole which at least constituted a start toward ultimate improvement in the quality of the educational effort there. It perhaps looked to ultimate desegregation. We must hold then that this frustration of the board plan which had for its purpose relief of the effects of segregation at Cole was unlawful. Resolutions 1520 and 1524, as they apply to East and Cole, should be implemented.

In reaching the above conclusion, we have very carefully considered both the majority and minority opinions in the now famous Supreme Court decision of *Reitman* v. *Mulkey* (387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967)), and have concluded that both opinions fully support the position which we have taken.

It will be recalled that *Mulkey*, like the case at bar, had to do with the repeal of legislative acts which recognized rights guaranteed by the equal protcetion clause of the 14th amendment. These were in the form of California statutes prohibiting the denial by individuals of the right to be free and equal regardless of race. The plaintiffs were tenants in apartment buildings, who were denied accommodations. By initiative a constitutional amendment, proposition 14, was adopted. This seemingly innocuous provision guaranteed to everyone unlimited right to decline to sell or rent his property in his uncontrolled discretion. Thus, proposition 14, or article I, section 26, effectively repealed the statute relied on by plaintiff.

The Supreme Court struck down the California amendment adopted by popular vote and did so despite its neutral visage. The Court held that it had the effect of involving the State in "private racial discriminations to an unconstitutional degree." The majority opinion of Mr. Justice White, in concluding that this was discriminatory State action, said:

> None of these cases squarely controls the case we now have before us. But they do illustrate the range of situations in which discriminatory State action has been identified. They do exemplify the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved tiself with invidious discriminations. Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will sig-

> nificantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.
>
> (387 U.S. at 380–381, 87 S.Ct. at 1634.)

Our case is like *Mulkey* in that it also involves repeal or rescission of a previous enactment which extended and upheld nondiscriminatory rights. Our case is stronger than *Mulkey* in that there the statute was brought to bear on private transactions. Here, on the other hand, there can be no question about whether it is the State which is discriminating.

The sole basis for the dissenting opinion of Justice Harlan was that the constitutional provision was not State action: that it was merely a proclamation of State neutrality in transactions private in nature. The opinion of Mr. Justice Harlan states:

> In the case at hand California, acting through the initiative and referendum, has decided to remain "neutral" in the realm of private discrimination affecting the sale or rental of private residential property: in such transactions private owners are now free to act in a discriminatory manner previously forbidden to them. In short, all that has happened is that California has effected a *pro tanto* repeal of its prior statutes forbidding private discrimination. This runs no more afoul of the 14th amendment than would have California's failure to pass any such antidiscrimination statutes in the first instance. The fact that such repeal was also accompanied by a constitutional prohibition against future enactment of such laws by the California Legislature cannot well be thought to affect, from a Federal constitutional standpoint, the validity of what California has done. The 14th amendment does not reach such State constitutional action any more than it does a simple legislative repeal of legislation forbidding private discrimination.
>
> (387 U.S. at 389, 87 S.Ct. at 1638.)

It cannot be argued in the case at bar that the legislative action of the school board was neutral. The board specifically repudiated measures which had been adopted for the purpose of providing a measure of equal opportunity to plaintiffs and others. The school board action was, to say the least, not neutral and the causal relation between the school board action and the injuries is direct. We find and conclude then that *Mulkey* not only supports our position, it is a compelling authority in support of the conclusion which we have reached. It is so closely analogous that we would be remiss if we failed to follow it.

II

The evidentiary as well as the legal approach to the remaining schools is quite different from that which has been outlined above, For one thing, the concentrations of minorities occurred at an earlier date and, in some instances, prior to the *Brown* decision by the Supreme Court. Community attitudes were different, including the attitudes of the school board members. Furthermore, the transitions were much more gradual and less perceptible than they were in the Park Hill schools.

Still another distinguishing point is that we do not here have legislative action similar to the rescission of Resolutions 1520, 1524, and 1531.

The first count of plaintiffs' second claim for relief alleges that de jure segregation exists at Manual High School; Cole Junior High School; Morey Junior High School; Boulevard Elementary School; Columbine Elementary School; and Harrington Elementary School as a result of school board action designed to isolate Negro and Hispano children in the above schools. Furthermore, plaintiffs claim that this intentional isolation of minority children aggravated or produced the segregated condition of the schools in question.

In support of their allegations, plaintiffs have offered boundary changes and other acts on the part of the school board as constituting de jure segregation.

Before discussing the acts which are relied on, one other factor needs to be mentioned. In some of the schools there are concentrations of Hispanos as well as Negroes. Plaintiffs would place them all in one category and utilize the total number as establishing the segregated character of the school. This is often an oversimplification (certainly if relief is to be granted in a school, the Hispano should receive the same benefit as the Negro.) The plaintiffs have accomplished this by using the name "Anglo" to describe the white community. However, the Hispanos have a wholly different origin, and the problems applicable to them are often different.

One of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination. However, whether it is permissible to add the numbers of the two groups together and lump them into a single minority category for purposes of classification as a segregated school remains a problem and a question.

It would seem then that to the extent that Hispanos, as a group, are isolated in concentrated numbers, a school in which this has occurred is to be regarded as a segregated school, either de facto or de jure.

We turn now to a consideration of the evidence offered by plaintiffs regarding boundary changes and elimination of optional areas, which evidence is presented in support of their argument that de jure segregation exists in the affected schools. Our comments and legal conclusions will follow.

NEW MANUAL HIGH SCHOOL

Located at 1700 East 28th Avenue

Present racial composition:

60.2 percent Negro;
27.5 percent Hispano; and
8.2 percent Anglo.

Both the old and the new Manual were and are located in the older part of the city. This is an area which has long been occupied by the Negroes and is now partly occupied by the Hispanos as well. In the very earliest days of Denver it probably had no racial or ethnic character, and before the Negroes it was in all likelihood occupied by laboring people of various national origins.

The Negro movement has always been eastward because this has been the only open corridor, and this continues to be the case. Plaintiffs' big complaint is that the school was built in this old location and was thus earmarked for minority occupants. However, we have to be mindful of the evidence that it was opened in 1953 at a time prior to *Brown* v. *Board of Education* (347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)), and we are told that this location had the consent of the people in the neighborhood. At that time there was much less concern about minority concentration. The community concern was with the nature and character of the new facility. In any event, the new Manual High School had the same attendance boundaries as the old. The eastern boundary of the mandatory Manual attendance zone was between Williams and High Streets, just one-half block east of the school site.[9]

In 1953, Manual was operating under its capacity, while East High School, to the southeast, was filled to capacity.[10] Although data is not available as to the 1953 Hispano enrollment at Manual, we know that in 1949-50 this figure was 23.5 percent. The Negro enrollment at Manual in 1953 was 35 percent. We can infer, therefore, that when new Manual opened in 1953, it was a minority school if Negroes and Hispanos are aggregated. Nearby East High School was predominantly Anglo, with a Negro enrollment of only 2 percent.

By 1956, Manual High School was 42 percent Negro. Whereas in 1953 the Williams-High boundary of the Manual attendance zone was approximately coterminus with the easternmost point of Negro population movement, by 1956 the Negro population had expanded eastward to roughly York Street. In January 1956, the school administration recommended that the Manual boundary be moved east to York Street, thus including a portion of the former East-Manual optional zone.[11] This proposed boundary, therefore, coincided with the eastern movement of Negro population in that area.

The 1956 Manual boundary change was resisted by some members of the Negro community on the ground that it would serve to contain Negro students living between Williams and York at Manual by cutting off their prior option to atend East. This concern was communicated to the school board at a series of public meetings. The school administration justified the change on the basis of the overcrowding at East and the underutilization at Manual. Manual had sufficient capacity to accommodate more students than those to be transfered under the proposed boundary change. It was, therefore, suggested that the board move the Manual boundary east to Colorado Boulevard. This would have embraced a predominantly Anglo neighborhood. Such a move would not only have further alleviated overcrowding at East, but would also have had some integrating effect at Manual. How much we do not know. It would not have substantially changed its character, and the integrating effort would have been temporary, only because in a few years this neighborhood became Negro.

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[9] The new Manual attendance area was irregularly shaped with its northern boundary at the city limits, its western boundary at the Platte River, and its southern boundary at 17th Avenue. Only the eastern boundary, between Williams and High Streets, is relevant for the purposes of this case.

[10] The capacity utilization of a school is a function of school size and number of students. Plaintiffs have computed school capacity by using the figure of 30 students per room multiplied by the number of rooms in the school. Defendants contend that this is unrealistic, because at lower achieving schools the student-teacher ratio has been reduced, so that, for example, 25 students per room may constitute capacity. Throughout this opinion, the lower achieving schools will be considered undercapacity only where the degree of undercapacity as represented by plaintiffs' data is so great that it cannot be explained purely in terms of a lower teacher-pupil ratio.

[11] East High School, at this time, had a Negro enrollment of 1 percent.

COLE JUNIOR HIGH SCHOOL

Located at 3240 Humboldt Street

Present racial composition:

72.1 percent Negro;
25.0 percent Hispano; and
1.4 percent Anglo.

In 1952, the eastern boundary of Cole Junior High was four blocks east of the school, between High and Race Streets.[12] At this time Cole was undercapacity while Smiley Junior High, a predominantly Anglo school a short distance east of Cole, was overcapacity by approximately 300 students. Although the empty space at Cole would have been utilized to alleviate overcrowding at Smiley, this course of action was not taken.[13] Instead, the school administration determined to construct an addition at Smiley.

In 1956, a boundary change was proposed whereby the eastern boundary of Cole would be extended to York Street, thus transferring part of the Cole-Smiley optional zone to Cole.[14] This proposed change was criticized by members of the Negro community on the ground that its tendency was to preclude Negro students who were living between Race and York Streets from attending Smiley and would force them to attend Cole, which, by this time, was rapidly becoming a segregated school. Nevertheless, the Cole-Smiley boundary proposal was adopted. After the shift in the Cole boundary, Smiley remained overcapacity while Cole was substantially undercapacity.

In 1958, another addition was built at Smiley. As in 1952, this action was taken notwithstanding that empty spaces were available at Cole.

In March 1969, the school board adopted Resolution 1524, which called for the reduction of student population at Cole. This action was designed to improve the educational opportunity offered to those students remaining at Cole, while making room for special education programs for low achieving students. Resolution 1524 was rescinded in June 1969.[15]

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[12] Although there is no direct evidence of the racial composition of Cole in 1952, we may infer that it was a predominantly minority school at that time from the fact that in 1946–47 its racial composition was 43 percent Anglo; 21 percent Negro; 29 percent Hispano and 7 percent "Mongolian." By 1952 the Negro enrollment at Cole had increased to 30 percent.

[13] This would presumably have entailed the transfer of Anglo students at Smiley to the predominantly minority Cole.

[14] This 1956 boundary change was allegedly made in response to the building of Hill Junior High School. However, the Hill attendance zone was carved out of the Smiley, Morey and Gove attendance zones and Cole did not play a significant part in the creation of the Hill area. It is also apparent that the Cole-Smiley boundary change of 1956 paralleled the Manual-East change of that same year, and the objections of many Negro leaders were the same with respect to both of these changes.

MOREY JUNIOR HIGH SCHOOL

Located at 840 East 14th Avenue

Percent racial composition:

52.4 percent Negro;
26.8 percent Anglo; and
18.6 percent Hispano.

The racial composition of Morey Junior High School in 1961 was between 65 and 80 percent Anglo. Morey was surrounded on four sides by optional zones. In 1962, the school board adopted boundary changes which eliminated all but one of the Morey optional zones.[16] After this enactment became effective, the estimated Anglo enrollment at Morey declined to between 45 and 49 percent. Thus, the 1962 Morey boundary changes were largely responsible for the transformation of Morey from a predominantly Anglo school in 1961 to a predominantly minority school in 1962.

The defendants' testimony was to the effect that these changes were made in order to better utilize the capacities of Hill, Byers, and Baker Junior High Schools. The testimony also showed that at that time Cole Junior High School, which was then predominantly Negro, was overcapacity and Morey was the most convenient school available for the purpose of accomplishing the objective. The effect, of course, was to relieve somewhat the concentration of Negroes at Cole, which substantially increasing the number of Negroes at Morey.

Undoubtedly, it is possible that the board could have worked out a more equitable distribution, but it cannot be said that this was carried out with the design and for the purpose of causing Morey to become a minority school. The board could not have escaped criticism from the plaintiffs if it had continued the concentration of Negroes at Cole rather than transferring them to Morey.

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[15] We have determined in part I of this opinion that the rescission of Resolution 1524 was unconstitutional and that Resolution 1524 should be effectuated with respect to Cole. In this part of the opinion we are concerned only with whether further relief is warranted with reference to Cole.

[16] The 1962 changes involved transferring the Morey-Hill optional zone to Hill; the Morey-Byers optional zone to Byers; the Morey-Cole optional zone to Morey; and the Baker-Morey optional zone to Morey. The racial composition of each of these areas, as reflected by 1960 census tract data, is roughly as follows:

A. Morey-Hill optional zone—0 to 3 percent Negro, 0 to 3 percent Hispano
B. Morey-Byers optional zone—0 to 3 percent Negro, 0 to 3 percent Hispano
C. Morey-Cole optional zone—10 percent to over 50.1 percent Negro (with the larger portion over 50.1 percent Negro), 3.1 to 10 percent Hispano
D. Baker-Morey optional zone—0 to 3 percent Negro, 10.1 to 25 percent Hispano

Also, a portion of the Cole Junior High mandatory zone was transferred to Morey, the racial composition of this area being over 50.1 percent Negro and 3.1 to 10 percent Hispano.

A particularly strong protest with respect to the above boundary changes was voiced by parents of Anglo children living between 6th and 8th Avenues in a mandatory Morey attendance zone. They asserted that these changes would transform Morey into a minority school. In response to this protest the School Board also transferred this area between 6th and 8th Avenues to Byers, a predominantly Anglo junior high school.

BOULEVARD ELEMENTARY SCHOOL

Located at 2351 Federal Boulevard

Present racial composition:

68.1 percent Hispano; and
29.9 percent Anglo.

In 1961, Boulevard Elementary School was undercapacity and its racial composition was 59 percent Anglo and 40 percent Hispano. Brown Elementary School, five blocks west of Boulevard, was operating at approximately full capacity and was 98 percent Anglo. Ashland Elementary School, northeast of Boulevard, was operating at its capacity and was 61 percent Anglo and 37 percent Hispano. The razing of a portion of Boulevard resulted in a decrease in that school's capacity, requiring the administration to adjust the Boulevard boundaries. The western portion of the Boulevard subdistrict was transferred to Brown and the southwest part of the Ashland attendance zone was assigned to Boulevard. As a result of these boundary alterations, the Hispano population of Boulevard was increased to 60 percent while reducing the Anglo enrollment to 39 percent, thus transforming Boulevard from a predominantly Anglo to a predominantly Hispano school. The school administration denied that this decision had any racial or ethnic character, maintaining that it was a matter of necessity because of the age and condition of the building destroyed.

COLUMBINE ELEMENTARY SCHOOL

Located at 2545 East 28th Avenue

Present racial composition:

97.2 percent Negro;
2.2 percent Hispano; and
0.6 percent Anglo.

In 1951, Columbine Elementary School was overcapacity and its Negro enrollment was 24 percent. Harrington Elementary was slightly overcapacity and had no Negro students. Stedman Elementary School, which has been considered in part I of this opinion, at 29th and Dexter, was operating slightly under its capacity and also had no Negro students.

Three optional zones were established around Columbine in 1952—Columbine-Harrington; Columbine-Mitchell; and Columbine-Stedman. The asserted purpose of this action was to relieve overcrowding at Columbine. However, since both Harrington and Stedman were operating at approximately their capacity prior to the creation of the optional zones, the effect of the administration's action was to slightly decrease overcrowding at Columbine while creating an overcrowded situation at Harrington and Stedman. Furthermore, a study of the racial composition of these schools 1 year after the creation of the optional zones indicated that the options were apparently employed by

Anglo students as a means of escaping from Columbine to the almost totally Anglo Harrington and Stedman.[17]

Before considering the legal consequences of the above discussed actions of the school board, there are some other facts which should be mentioned.

Former Superintendent Oberholtzer testified at great length to the fact that the administration, including the board, followed a policy of strict neutrality as far as segregation or integration was concerned. Indeed, Superintendent Oberholtzer stated that even after the decision in *Brown* v. *Board of Education, supra*, he was of the opinion that it was not permissible for him to classify Negroes as such, even for the purpose of bringing about integration. Thus, it was his belief that he was committed to maintaining the status quo in the schools. Other members of the board also denied vigorously that they had ever been motivated by either an intention or desire to discriminate. Their testimony was that the boundary changes and their other actions were taken in order to utilize school capacities and carry out the neighborhood school concept.

In examining the boundary changes and removal of optional zones in connection with the several schools which are discussed above, we do not find any wilful or malicious actions on the part of the board or the administration (in relationship to elementary schools). As to these schools, the result is about the same as it would have been had the administration pursued discriminatory policies, since the Negroes and, to an extent the Hispanos as well, always seem to end up in isolation. The substantial factor in this condition is twofold: First, a failure on the part of the board or of the administration to take any action having an integrating effect, and second, deeply established housing patterns which have existed for a long period of time and which have been taken for granted.

It should also be kept in mind that prior to *Brown* v. *Board of Education, supra*, it was apparently taken for granted by everybody that the status quo, as far as the Negroes were concerned, should not be disturbed because this was the desire of the majority of the community. Time and again the board members testified to the fact that in making decisions they held hearings and finally bowed to the community sentiment. Thus, they say they did not intend to segregate or refuse to integrate. They just found the consensus and followed it.

Under the present state of the law, particularly in the 10th circuit, a condition such as we have described above does not dictate the conclusion that this is de jure segregation which calls for an all-out effort to desegregate. It is more like de facto segregation, with respect to which the rule is that the court cannot order desegregation in order to provide a better balance.

It is to be emphasized here that the board has not refused to admit any student at any time because of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless it is necessary to bus him to relieve overcrowding.

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[17] Between 1951 and 1952, the Negro enrollment at Columbine jumped from 24 percent to 31 percent, while there was no significant increase in Negro enrollment at either Harrington or Stedman. Between 1952 and 1955, the Negro enrollment at Columbine increased 38 percent.

From the cases, we gleaned the following principles as essentials of de jure segregation:

1. The State, or more specifically, the school administration, must have taken some action with a purpose to segregate;
2. This action must have in fact created or aggravated segregation at the school or schools in question;
3. Current condition of segregation must exist; and
4. There must be a casual connection between the acts of the school administration complained of and the current condition of segregation.

The first of the above requirements actually consists of two elements—State action and a purpose to segregate. It seems unnecessary to elaborate on the element of State action at this time, since plaintiffs here emphasize only affirmative official acts.

The important distinguishing factor between de facto and de jure segregation is purpose to segregate. See, e.g., *Board of Education, etc.* v. *Dowell* (375 F. 2d 993 (1967)); *Downs* v. *Board of Education of Kansas City* (336 F. 2d 988 (10th Cir. 1964)), cert. denied (380 U.S. 914, 85 S. Ct. 898, 13 L. Ed. 2d 800 (1965)). As the Court of Appeals for the 10th circuit stated in *Dowell, supra*:

> In *Downs* the trial court found the plan was not being used to deprive students of their constitutional rights and here the trial court, in substance, found to the contrary. It is still the rule in this circuit and elsewhere that neighborhood school attendance policies, when impartially maintained and administered, do not violate any fundamental constitutional principle or deprive certain classes of individuals of their constitutional rights.

(375 F. 2d at 166.)

Segregative purpose may be overt, as in the dual system maintained in some States prior to *Brown* v. *Board of Education, supra*, or it may be covert, in which case purpose normally must be proved by circumstantial evidence. In order to satisfy this element of purpose, the intent to segregate need not be the sole motive for a school district's action; it need only be one of several factors which motivated the school administration Thus, regardless of how this purpose is manifested, it is clear that:

> . . . the constitutional rights of children not to be discriminated against in school admission on grounds of race or color . . . can neither be nullified openly and directly by State legislators or State executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "geniously or ingenuously"

Cooper v. *Aaron* (385 U.S. 1, 17, 78 S. Ct. 1401, 1049, 3 . Ed. 5, 19 (1958)).

The second requirement, assuming purposeful State action, is that the act or act must have resulted in or substantially aggravated segregation. A threshold problem here is a definition of "segregation." This term connotes first and foremost a very heavy concentration of a minority group within the school in question. Once you have a predominantly minority school population, other factors come into consideration. For example, the racial and ethnic composition of faculty and staff, e.g., *Bradley* v. *School Board* (382 U.S. 103, 86 S. Ct. 224, 15 L. Ed. 2d 817 (1965)); *Hobson* v. *Hansen* (269 F.Supp. 401, 502 (D.D. C. 1967)), aff'd *sub nom., Smack* v. *Hobson* (132 U.S. App. D.C. 372. 408 F.2d 175 (1969)); the equality of education opportunity offered at the school; and the community and administration attitudes toward the school.

The third requirement, that a condition of segregation presently exists, recognizes the fact that the term "de jure segregation" speaks in present terms. In other words, if a past condition of segregation has been remedied, either through positive State action or through the natural course of events, there is, of course, no present injury justifying equitable relief.

The final and most important element in this case is that of a causal relationship between the discriminatory action complained of and the current condition of segregation in the school or schools involved. Thus, it would be inequitable to conclude de jure segregation exists where a de jure act had no more than trifling effect on the end result which produced the condition.[18] In such a case no relief can be granted, for it is not the duty of a court of equity to punish a school board for all past sins, but rather to afford a remedy only where past sins have resulted in present injury.

This necessity of a causal connection between present injury and past discriminatory acts was recognized in *Hobson* v. *Hansen, supra.* Prior to 1954 the District of Columbia schools had been segregated by law. In 1954 a neighborhood policy was adopted in the District. At the time the *Hobson* case was instituted, substantial desegregation had not been achieved. Plaintiffs, therefore, contended that the effects of the dual system still remained and that they were entitled to relief. Judge Wright held that the dual system was insignificant as a cause of the present segregation:

> This suit was begun 12 years after the institution of the neighborhood school policy. . . . Many concurrent causes have combined with the board's 1954 decision in the evolution of present reality. If the segregation in the District's schools is not currently objectionable under either an independent de facto or de jure rationale, it would be very difficult to strike it down merely because the neighborhood school policy failed to produce sufficient integration when it replaced an overt de jure system 13 years ago.
> (269 F.Supp. at 495.)

So also in our case, the complained of acts are remote in time and do not loom large when assessing fault or cause. The impact of the housing patterns and neighborhood population movement stand out as the actual culprits.

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[18] Although past discriminatory acts may not be a substantial factor contributing to present segregation, they may nevertheless be probative on the issue of the segregative purpose of other discriminatory acts which are in fact a substantial factor in causing a present segregated situation. Thus, in part I of this opinion, we discussed the building of Barrett, boundary changes and the use of mobile units as they relate to the purpose for the rescission of Resolutions 1520, 1524 and 1531.

Plaintiffs have argued that the construction of the new manual in 1953 at the old site virtually insured its segregated character and that this act, as well as the Manual and Cole boundary changes, together with the Smiley additions at a time when Cole was under-capacity, are acts of de jure segregation. Quite apart from the cause element which will be discussed further below, it cannot be said that the acts were clearly racially motivated. One would have to labor hard in order to come up with this conclusion.

It can, however, be concluded that the segregation (or racial concentration) which presently exists at Manual and Cole, except insofar as Cole was affected by Resolution 1524 and its rescission as explained above in part I, is not de jure. How much of an impact the board's decisions at the time had on minority concentrations we do not know. We do know that much of the concentration occurred long after these decisions were made. For example, the Negro population at Cole and Manual increased over 20 percent between 1963 and 1968, and the only contribution which the board could have made to that resulted from inaction. An essential requisite of a violation of the equal protection clause of the Constitution in the present context is positive legislative or administrative State action which discriminates on account of race, and which produces the condition complained of. The instant situation then cannot be placed at the administration doorstep; if cause or fault has to be ascertained it is that of the community as a whole in imposing, in various ways, housing restraints.

Similarly, it is doubtful whether the 1952 boundary change at Columbine can now be classified as a de jure act. To be sure, it increased the minority concentration at Columbine; yet there is a dearth of evidence that this was accompanied by a purpose to segregate rather than a purpose to eliminate double sessions, which was also a result of the change. In any event, as in the case of Manual and Cole, this act appears in retrospect to have had little to do with the present minority population at Columbine. Between 1953, the year following the Columbine boundary modification, and 1969, the percentage of Negro enrollment at the school more than doubled. Even the 1960 census tract data shows that almost the entire Columbine subdistrict was in an area with over 50.1 percent Negro population. It is not conceivable then that this 1952 boundary change, the immediate effects of which were relatively insignificant, could be a current cause of segregation at Columbine.

The Boulevard boundary change of 1962 was necessitated by the legitimate need to reduce pupil enrollment due to the razing of a portion of the school. Furthermore, there is absolutely no evidence presented, other than the fact of the 1962 change, upon which to base a finding that the school district was motivated by an intent to segregate Hispano students at Boulevard Elementary School.

The removal of the Morey Junior High School optional ones in 1962 did have the effect of increasing the concentration of minority students at that school. It also had the salutary effect of relieving the concentration of Negro students at Cole, a result consistent with defendants' claim that it was carrying out a racially neutral policy. Both the desirable and undesirable consequences of the 1962 changes appear to have been byproducts of a general redistribution. In view of that, it would strain both the facts and law to say that the administration acted with an unlawful purpose or design in this instance.

Moreover, whether Morey is presently a segregated school remains a question. To so categorize it requires the lumping together of all non-Anglo groups. The current racial composition at Morey is 52.4 percent Negro, 26.8 percent Anglo, 18.6 percent Hispano. Over 80 percent of the classroom teachers at Morey are Anglo. Morey is unquestionably racially imbalanced, is in transition and will offer a concentration problem unless the board acts to stabilize it.

Plaintiffs' further claim is that the neighborhood school policy itself has been maintained by the school board for the purpose and with the effect of segregating minority pupils to the degree that it is unconstitutional. They rely on the rulings of our court of appeals that the deliberate use of a neighborhood school system to perpetuate segregation is unlawful. *Board of Education, etc.* v. *Dowell* (375 F. 2d 158 (10th Cir. 1967)), cert. denied (387 U.S. 931, 87 S. Ct. 2054, 18 L. Ed. 2d 993 (1967)); *Downs* v. *Board of Education* (336 F. 2d 988 (10th Cir. 1964)), cert. denied (380 U.S. 914, 85 S. Ct. 898, 13 L. Ed. 2d 800 (1965)). What we have said above regarding boundary changes disposes of this contention. There is no comprehensive policy apparent other than the negative approach which has been described which could be considered in this context. The board's eye-closing and head-burying is not the kind of conduct which the circuit court had in mind in *Dowell* and *Downs*.

Finally, the third count of plaintiffs' second claim for relief urges us to adopt a rule of law that a neighborhood school policy may in and of itself create and/or maintain unconstitutional segregation, even if the adoption of such a policy is motivated by legitimate factors. Plaintiffs' argument in essence is that the neighborhood school system is unconstitutional if it produces segregation in fact. We recognize that some courts have moved along this line.[19] However, the law in our circuit, as enunciated in *Downs* and *Dowell*, *supra*, is that a neighborhood school policy, even if it produces concentration, is not *per se* unlawful if:

> . . . it is carried out in good faith and is not used as a mask to further and perpetuate racial discrimination.
>
> *Board of Education, etc.* v. *Dowell* (375 F. 2d 158, 166 (10th Cir. 1967)).

The U.S. Supreme Court has not yet ruled on this question, and we are here subject to the strong pronouncements of our circuit court. Under these decisions plaintiffs are not entitled to relief merely upon proof that de facto segregation exists at certain schools within the school district.[20]

In summary then, we must reject the plaintiffs' contentions that they are entitled to affirmative relief because of the above mentioned boundary changes and elimination of optional zones. We hold that the evidence is insufficient to establish de jure segregation.

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[19] Hobson v. Hansen, 269 F.Supp. 401 (D.D.C.1967), *sub nom.*, Smuck v. Hobson, 132 U.S.App.D.C. 372, 408 F.2d 175 (1969); Barksdale v. Springfield School Committee, 237 F.Supp. 543 (D.Mass.1965), vacated, 348 F.2d 261 (1st Cir. 1965); Blocker v. Board of Education, 226 F.Supp. 208 (E.D.N.Y.1964); Branche v. Board of Education, 204 F.Supp. 150 (E.D.N.Y.1962).

[20] There is no discernable difference in result between the *de facto* and *de jure* varieties. Both produce the same obnoxious results, but the Supreme Court has so far given its attention to the more serious problem of dual schools.

III

The third count of plaintiffs' second claim for relief alleges that defendants are maintaining certain schools within the district which provide an unequal educational opportunity for the students attending them; that these are segregated schools;[21] and that, therefore, the students at these schools are being denied the equal protection of the law. The plantiffs seek relief for a large number of schools at every level and in various conditions of racial concentration. These include Barrett, Boulevard, Bryant-Webster, Columbine, Crofton, Ebert, Elmwood, Fairmont, Fairview, Garden Place, Gilpin, Greenlee, Hallett, Harrington, Mitchell, Smith, Stedman, Whittier, Wyatt, and Wyman Elementary Schools; Baker, Cole, Morey, and Smiley Junior High Schools; and East, Manual, and West High Schools.[22] In addition to the charge that all these schools are segregated,[23] plaintiffs maintain these are inferior schools and that racial concentration produces the inferiority. They use several indicia to establish the inferiority and inequality. All of these schools, they say, have (1) low average scholastic achievement; (2) less experienced teachers: higher rates of teacher turnover; (4) higher dropout rates: and (5) older buildings and smaller sites.

Extensive and detailed evidence has been presented establishing the inferiority of plaintiffs' target schools. Some of these have high concentrations of either Negroes or Hispanos. Others are substantial, but at the same time relatively marginal in this regard.

It is clear that there is a relationship between racial concentration and inferiority in achievement and low standards and consequently low morale. However, our mission is to determine inequality based upon race or ethnic origin, and we cannot undertake to cure all other ills which we might encounter here. The plantiffs, of course, believe that all injustices ever encountered should be rooted out. Tentatively, at least, we have determined that for the present purpose a concentration of either Negro or Hispano students in the general area of 70 to 75 percent is a concentrated school likely to produce the kind of inferiority which we are here concerned with.

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[21] Plaintiffs contend that where, as here, it is claimed that schools provide an unqual educational opportunity, it is irrelevant whether the schools in question are *de jure* or *de facto* segregated. This point is discussed later in this selection.

[22] These schools were selected by plaintiffs through use of probability theory. Thus, they claim that if all children were picked at random to attend each school in the District, the probability that the present racial composition would result at each of the above schools is phenomenally low. We do note that the schools selected through this procedure are generally those with the highest concentration of minority students in the District.

[23] Some of the above schools (Barrett, Smiley and East) have been considered, and full relief has been granted, in part I of this opinion. However, since these schools (with the exception of East) were clearly segregated before this suit was instituted, the statistical data on the educational opportunity provided by them prior to their desegregation has some relevance in creating an overall picture as to the effect of segregation on educational opportunity, and hence it is included in the findings of fact which follow.

In the columnar list below, the elementary, junior and senior high schools with respect to which the plaintiffs have presented evidence are shown. It is to be noted that some of these schools are subject to the findings and conclusions contained in part I of this opinion, but they are nevertheless included here because of their racial concentrations, if not in every instance their educational inferiority.

[In percent]

School	Anglo	Negro	Hispano
Elementary schools:			
Barrett [1]	67. 0	30. 5	1. 4
Boulevard	29. 9	. 5	68. 1
Bryant-Webster	23. 3	. 5	75. 5
Columbine	. 6	97. 2	2. 2
Crofton	7. 3	38. 4	51. 5
Ebert	10. 6	34. 6	52. 4
Elmwood	7. 9	00. 0	91. 6
Fairmont	19. 8	00. 0	79. 9
Fairview	7. 0	8. 2	83. 2
Garden Place	17. 0	17. 2	64. 7
Gilpin	3. 2	36. 4	59. 4
Greenlee	17. 0	9. 0	73. 0
Hallett	38. 2	58. 4	2. 6
Harrington	2. 2	76. 3	19. 6
Mitchell	2. 2	70. 9	26. 7
Smith	4. 0	91. 7	3. 3
Stedman	4. 1	92. 7	2. 7
Whittier	1. 4	94. 0	4. 5
Wyatt	1. 9	46. 4	51. 5
Wyman	27. 5	38. 0	29. 7
Junior high schools:			
Baker	11. 6	6. 7	81. 4
Cole	1. 4	72. 1	25. 0
Morey	26. 8	52. 4	18. 6
Smiley [1]	61. 2	30. 4	6. 9
Senior high schools:			
East	50. 1	39. 9	7. 4
West	56. 6	9. 0	34. 0
Manual	8. 2	60. 2	27. 5

[1] Barrett and Smiley have been integrated by the preliminary injunction.

Based on the rule of thumb adopted above, we are here primarily concerned with the following schools: Bryant-Webster, Columbine, Elmwood, Fairmont, Fairview, Greenlee, Hallett, Harrington, Mitchell, Smith, Stedman, and Whittier Elementary Schools; Baker and Cole Junior High Schools; and Manual High School.

A. Achievement

Plaintiffs' evidence establishes that the scholastic achievement in the above schools is significantly lower than in the other schools in the city. To evidence this, they point to the 1968 Stanford achievement test results, which results are designed to measure the achievement level of each pupil in specific scholastic areas, such as spelling, arithmetic, and science. Achievement data for elementary, junior, and senior high schools appears in appendix I.

At the elementary school level, these Stanford tests results are reported in terms of grade level scores for the third and fifth grades in

May 1968. Since May 1 marks the approximate date at which the eighth month of school begins, we are told that a third-grade student should be achieving at a 3.8 level at this time, while a fifth-grade student should be achieving at a 5.8 level.

We find that in May 1968, the children in the third grade at the segregated schools in question achieved at a grade level of approximately 2.96, and accordingly, were almost 1 full year below the level at which they should have been achieving. With respect to all 91 schools in the district in 1968, the average median grade level was 3.57, or approximately 6 months above the achievement level of the schools listed above.

Similarly, the average achievement among fifth-grade students at the 12 segregated elementary schools was 4.30. All fifth graders in the district averaged 5.22, which is almost a full year ahead of the 12 segregated schools.

The data with respect to junior high schools, also shown in appendix I, is based upon the May 1968 Stanford achievement tests, and is reported in terms of percentile scores (no grade placement scores were available for junior or senior high schools). A percentile score shows the percentage of pupils nationally whose scores are below the given percentile. For example, if a student's percentile score on a given test is 75, then 75 percent of the students in his grade nationally have scored lower on that test. Similarly, 25 percent of the students taking the test have scored higher.

The average percentile score for all ninth graders on all tests administered is 53.8. However, the two segregated junior high schools (Baker and Cole) achieved at an average percentile score of only 28.2. This is some 29 percentiles below the average percentile score among all ninth graders. It is interesting to note that the highest average percentile score of the two segregated junior high schools is lower than the lowest average percentile score at any of the other junior high schools in the city.

Senior high school data is based upon tests given in May 1968, to all 11th-grade students in the district, and, like the junior high school data, these scores are reported in terms of average median percentile.

The average median percentile score for all high schools at the 11th-grade level was 52. For Manual, the only minority concentrated high school, the average percentile score was 30. Thus, at the 11th-grade level Manual achievement was some 22 percentiles lower than the high school average for the city, and 70 percent of all students nationally performed better than the median at Manual.

B. Teacher experience

Faculty experience is an important factor in determining the educational opportunity offered at a particular school, and plaintiffs have produced evidence which shows the percentage of faculty at a given school with (1) no years of prior Denver public school experience; (2) probationary status (0–3 years of experience); and (3) 10 or more years' experience. Teacher experience data for elementary, junior, and senior high schools appear in appendix II. At the elementary school level plaintiffs have compiled teacher experience data for their 20 target schools and 20 selected schools with high Anglo enrollment. We have here selected only those schools out of plaintiffs' list of target schools which we find to be segregated, and have compared teacher experience in them with teacher experience in plaintiffs' selected Anglo schools.

The evidence establishes that in the 12 segregated elementary schools in 1968, 23.9 percent of the teachers had no previous DPS experience, 48.6 percent were on probation, and 17.4 percent had 10 or more years' experience. In contrast, in the 20 selected Anglo schools, only 9.8 percent of the faculty had no previous experience, 25.6 percent were on probation, and 47.1 percent—nearly half—had 10 or more years of experience. Of the 12 segregated elementary schools, only one—Bryant-Webster—had a higher percentage of teachers with 10 or more years' experience than teachers with no experience or on probation, while 16 of the 20 Anglo schools had more teachers with 10 or more years' experience than nonexperienced or probationary teachers.

As to junior high schools, plaintiffs have introduced teacher experience data on all junior high schools in existence in 1968 (see app. II). This evidence establishes that the segregated schools have more probationary and nonexperienced teachers and fewer teachers with 10 or more years experience than the selected Anglo schools.

The data with respect to senior high schools is similar to that on junior high schools. As was the case with the junior high schools, there are more high school teachers with no or little experience and fewer with over 10 years at Manual than in other senior high schools.

C. Teacher turnover

The effect of teacher turnover on the quality of educational opportunity is twofold. First, a high teacher turnover rate tends to have a disorganizing effect on the school in question. Furthermore, and more important, the teacher turnover rate in a particular school significantly affects the experience of the faculty at that school. In the present case, plaintiffs have established that the present policy with respect to teacher transfers has the effect of creating a much higher turnover rate at predominantly minority schools than at predominantly Anglo schools. This in turn results in more faculty vacancies at these minority schools and the assignment to them of new teachers with little or no Denver public school experience.

Denver public schools policy 1617A deals with transfers for faculty. On or about April 20 of each year, the assistant superintendent for personnel services posts in each school a list of teaching vacancies to be filled the following school year. Those teachers who wish to transfer to schools with vacancies submit an application. Although the principal criterion for determining whether to grant an application for transfer is "whether the request will result in the best educational program for the school district," one of the major considerations for filling vacancies is seniority. Thus, teachers with the most seniority are normally given preference in making transfers. This transfer policy is embodied in an agreement between school district No. 1 and the Denver Classroom Teachers Association.

This policy results in the more experienced teachers at minority schools transferring out of those schools when vacancies are opened at predominantly Anglo schools, with the resulting vacancies being filled by inexperienced teachers.

D. Pupil dropout rates

Plaintiffs' evidence as to dropout rates in junior and senior high schools[24] is set forth in terms of projected and annual dropout rates. The annual dropout rate merely indicates the percentage of students who leave school during a given year. The projected dropout rate for a given year reflects the percentage of students beginning at a particular school who will drop out before graduation (see app. III).

The evidence tends to indicate that, generally, the dropout rate is higher at the two segregated junior high schools (Baker and Cole) and Manual Senior High School than at the other schools in the district.

E. Building facilities

Plaintiffs have introduced evidence in an attempt to show a disparity in the age of school buildings and the size of school sites between predominantly minority and predominantly Anglo schools. We would agree that, in most general terms, this disparity exists. However, we do not think that the age of a building and site size are, in and of themselves, substantial factors affecting the educational opportunity offered at a given school. However, we do recognize that in schools which are segregated, have less experienced teachers, and produce generally low-achieving students, the fact that the physical plant is old may aggravate the aura of inferiority which surrounds the school.

The above material summarizes plaintiff's evidence and our findings as to the objective indicia of inequality at the schools for which they seek relief. Although plaintiffs claim that factors such as inexperienced faculty tend to contribute to the inferior educational opportunity provided at these schools, their main argument is that the segregation which exists at many of these schools makes a major contribution to this inferiority.

Dr. Dodson, a professor of eduaction at New York University, who has for the past 15 years studied the relationship between the scholastic performance of minority children and segregated schools, testified that a segregated school adversely affects a Negro child's ability to achieve. He indicated that studies show that by the time a school becomes segregated, it is looked upon by the whole community as being inferior.

At this point, the Negro community does not consider the segregated school as a legitimate institution for social and economic advancement. Since the students do not feel that the school is an effective aid in achieving their goal—acceptance and integration into the mainstream of American life—they are not motivated to learn. Furthermore, since the parents of these Negro students have similar feelings with respect to the segregated school, they do not attempt to motivate their children to learn. Teachers assigned to these schools are generally dissatisfied and try to escape as soon as possible. Furthermore, teachers expect low achievement from students at segregated schools, and thus do little to stimulate higher performance.

The defendants do not acknowledge that segregated schools per se produce lower achievement and an inferior educational opportunity. They point to other factors, such as home and community environment, socioecomnomic status of the family, and the educational background of the parents as the major causes of inferior achievement. We do not disagree that these factors are relevant, but we cannot ignore the overwhelming evidence to the effect that isolation or segregation per se is a substantial factor in producing unequal educational opportunity.

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[24] **Since, by law, it is mandatory that children attend school until the age of 16, there are no figures as to dropout rate with respect to elementary schools.**

The first study of the equality of educational opportunity in the Denver public schools conducted by the Voorhees Committee recognized this. In its 1964 report to the board of education this Committee stated that:

> In a "neighborhood" school system one inevitable result of concentrations of races and ethnic groups because of housing patterns is concentrations of children in the schools into the same groups. There is abundant authority to the effect that "de facto" separation in schools may result in educational inequalities, and there is in Denver wide belief among the racial and ethnic minorities that the schools to which their children go are in some way unequal. In addition, however, there is the fact that there is not available to many children (perhaps a majority of the total school population, regardless of race or ethnic background) the democratic experience of education with members of other races and groups with which they will have to live and compete. The responsibility to eliminate or reduce this result where possible and to compensate for it where elimination is not possible by the removal of prejudice (whether based on color, ethnic or religious background, false values, or any other cause) must be the responsibility of the schools to its pupils.
>
> (Voorhees Committee Report, pp. 6-7.)

The committee also said:

> In 1954 the U.S. Supreme Court stated that segregated education is inherently unequal education. There was then and is now ample authority for such a statement. While the Court in that instance was concerned with segregation established by law, the committee is persuaded that the same statement can correctly be made where de facto segregation of minority races occurs because of other factors, the most obvious of which is a patern of housing restriction. The committee feels that in adhering without obvious deviation to the principle of establishing school boundaries without regard to racial or ethnic background, the board and the administration have concurred, perhaps inadvertently, in the perpeutation of existing de facto segregation and its resultant inequalities in the educational opportunities offered.
>
> (Voorhees Committee Report, p. A-5.)

As a result of the Voorhees Report, the school board, on May 6, 1964, adopted policy 5100 providing that henceforth the school administration would maintain statistical data on the racial and ethnic composition of students in the Denver public schools. In adopting the philosophy of the Voorhees Report the board said:

> The continuation of neighborhood schools has resulted in the concentration of some minority racial and ethnic groups

> in some schools. Reduction of such concentration and the establishment of heterogeneous or diverse groups in schools is desirable to achieve equality of educational opportunity.

In 1966 the school board again created a committee to investigate inequality of educational opportunity due to racial concentration in schools (the Berge Committee). The committee's report is replete with references to the inferior education which results from segregation.

When we consider the evidence in this case in light of the statements in *Brown* v. *Board of Education* that segregated schools are inherently unequal, we must conclude that segregation, regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity.

The equal protection clause of the 14th amendment prohibits any State from denying to any person the equal protection of the laws. Simply stated, a State may not treat persons differently without a legitimate reason for doing so. In the area of economic regulation the courts grant broad leeway to the States in creating classes of individuals and treating them differently. All that need be shown is a minimal justification in terms of a legitimate State interest for the inequality of treatment.

The courts, however, have jealously guarded the rights of disadvantaged groups such as the poor or minorities, and have held that where State action, even if nondiscriminatory on its face, results in the unequal treatment of the poor or a minority group as a class, the action is unconstitutional unless the State provides a substantial justification in terms of legitimate State interest. See, e.g., *Griffin* v. *Illinois* (351 U.S. 12, 18 n. 11, 76 S. Ct. 585, 100 L. Ed. 891 (1956)); *Douglas* v. *California* 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963))[25] This general principle of constitutional law is fully applicable to school segregation cases. The present state of the law is that separate educational facilities (of the de facto variety) may be maintained, but a fundamental and absolute requisite is that these shall be equal. Once it is found that these separate facilities are unequal in the quality of education provided, there arises a substantial probability that a constitutional violation exists. This probability becomes almost conclusive where minority groups are relegated to the inferior schools. As Judge Wright stated in *Hobson* v. *Hansen*, supra:

> Theoretically, therefore, purely irrational inequalities even between two schools in a culturally homogeneous, uniformly

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[25] Under a claim for relief based upon separate-but-unequal school facilities, purpose or intent to discriminate is not a necessary factor. Where state action results in unequal treatment of the poor or minority groups, it is no defense that the state action was not taken with a purpose to injuriously affect only the poor or minorities as a class. *See* Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). *See also* Hobson v. Hansen, 269 F.Supp. 401, 497 (1967), which states:

> The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

> white suburb would raise a real constitutional question. But in cases not involving Negroes or the poor, courts will hesitate to enforce the separate-but-equal rule vigorously. . . . But the law is too deeply committed to the real, not merely theoretical (and present, not deferred) equality of the Negro's educational experience to compromise its diligence . . . when cases raise the rights of the Negro poor.
> (269 F.Supp. at 497.)

As Judge Wright further pointed out in the *Hobson* case, de facto segregation today stands in the same position as did de jure segregation prior to *Brown* v. *Board of Education.* Under the old *Plessy* doctrine (*Plessy* v. *Ferguson* (163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896))), a school board was under no constitutional duty to abandon dual school systems created by law so long as all schools were equal in terms of the educational opportunity offered. Today, a school board is not constitutionally required to integrate schools which have become segregated because of the effect of racial housing patterns on the neighborhood school system. However, if the school board chooses not to take positive steps to alleviate de facto segregation, it must at a minimum insure that its schools offer an equal educational opportunity.

The evidence in the case at bar establishes, and we do find and conclude, that an equal educational opportunity is not being provided at the subject segregated schools within the District.[26] (See page 78, supra, for a list of these schools.) The evidence establishes this beyond any doubt. Many factors contribute to the inferior status of these schools, but the predominant one appears to be the enforced isolation imposed in the name of neighborhood schools and housing patterns.[27] It strikes one as incongruous that the community of Denver would tolerate schools which are inferior in quality.

IV

Discussion of Remedies

A.—THE NORTHEAST DENVER SCHOOLS

Our preliminary injunction decree dealt largely with the Park Hill schools and, in effect, specifically enforced Resolutions 1520, 1524, and 1531, with the exception of that part of the resolution having to do with East Denver High School and that part having to do with Cole Junior High School.

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[26] This, of course, does not mean that we condemn in any way the leadership and educational efforts of the administration and faculty of these schools. Principals and teachers alike have put forth an outstanding effort to cope with the educational problems in their schools. However, until the underlying causes of these problems are removed, the work of these individuals can never be fully successful.

[27] We thus have a situation very similar to that found in Barksdale v. Springfield School Committee, 237 F.Supp. 543 (1965), vacated, 348 F.2d 261 (1st Cir. 1965). In that case Judge Sweeney found that *de facto* segregation was contributing to inequality of educational opportunity at the schools complained of. He then granted relief, not upon a theory that the School Board had an affirmative duty to remedy racial imbalance, but rather because the Constitution requires a School Board to provide equal educational opportunities for all children within the system.

In part I of this opinion we have determined that the plaintiffs are entitled to full relief in accordance with the resolutions and are also entitled to have the East and Cole resolutions implemented in the final judgment. Inasmuch as we have concluded that the preliminary injunction should be made final, the appropriate form of judgment can be prepared to cover this. The preliminary order will remain in effect for the remainder of this year, and the present judgment will take effect in September 1970.

B.—A PROGRAM OF IMPROVEMENT

Although we have concluded that there is not de jure segregation in the so-called core city schools,[27a] we have found and concluded that there is a denial of equal opportunity for education in these schools. We have found and concluded that the achievement level in these schools is markedly lower and dropout rates are high; and that there has been a concentration of minority and inexperienced teachers.

How to remedy this condition, that is how to extend to the plaintiffs equal educational opportunity, poses a serious and difficult problem, and we do not here present any cure-all. One obvious answer, of course, is that these schools must be renovated as educational institutions. The stress here is not on the inferiority of the buildings, and, indeed, they are oftentimes older and less attractive. Rather, the emphasis is on improving these as educational institutions. One obvious equalizing factor would be to have faculty members who are as competent as the faculty members at Anglo schools.

At the present time, teachers with seniority can select the superior schools and they do so. When these transfers occur a degrading effect on the school which they leave necessarily results. All concerned are reminded that theirs is a less desirable school. It may be that the administration will have to adopt a rule which prohibits these optional transfers by faculty members. These schools are entitled to at least their fair share of the most competent teachers. The administration may have to assign their very best teachers even if premium salaries have to be paid in order to accomplish this.

It is also clear from the evidence that the remedial or special education programs which have been carried on in these schools have not resulted in any significant improvement and so other methods are indicated. It does not fill the bill to merely apply for a Federal grant and reduce the teacher-pupil ratio.

Above all, these schools need pride and spirit so that the participants, teachers and pupils, will feel that they are part of a meaningful effort. Certainly a first step in instilling this is to provide them with leadership and dedicated personnel plus the tools to carry out programs. Whether this objective is possible cannot be determined until a genuine good faith effort is forthcoming. In Superintendent Gilberts and his staff the board has access to experts who are capable of formulating such a program. Obviously this court does not have this expertise, but it anticipates hearing from experts, including the board staff.

[27a] That is, the segregated schools referred to in Part III above.

C.—COMPULSORY TRANSPORTATION

The evidence in this case shows that neither the plaintiffs nor the defendants nor other interested parties are in favor of busing as such. It is, however, conceded to be a necessity where integration is ordered, and it would appear to be the only way to implement Resolutions 1520, 1524, and 1531 and to carry out part I of this opinion.

In connection with equalizing the educational opportunity, it is not so clear that compulsory transportation is the answer. To be sure, if the children could go to school together on a natural basis, it would undoubtedly provide the most effective antidote for the inferiority. However, setting up an artificial and extensive system of busing which compels cross-movement and which is not supported by either side has some tendency to undermine the program from the start.

There is a dearth of law in connection with the remedy applicable to equalizing the educational opportunity, and compulsory integration is not yet at least the prescribed remedy. However, it is conceivable that this could become the only effective remedy as a matter of law, and it conceivably could become recognized as a matter of constitutional law. Nevertheless, at this writing, the fashioning of a remedy is a process of weighing and balancing the equities.

From the intervenors and from other sources at the trial, the difficulties and vicissitudes of mandatory busing have been presented. One persuasive point arises from the proof of the plaintiffs. Their evidence establishing the inferiority of the subject schools is so convincing that it raises a serious equitable question about subjecting any pupils, minority or majority, to them. It would be imposing a sanction on pupils from good schools—a sanction for an offense which they did not commit.

D—VOLUNTARY TRANSFER POLICY

We have a single suggestion apart from improvement and that is a system of genuine voluntary transfer out of inferior schools to good schools. This would be a matter of right without the need for securing a reciprocal transfer from an Anglo school to a minority school. Persons desiring this immediate improvement of their educational opportunity could get it, and the district would, in accordance with its present policy based on distance, be required to furnish transportation. Moreover, the Board would be required to furnish space for these students. On the other hand, pupils attending the better schools would not be compelled to transfer to the core city schools.[28] They could do so if they wished.

Our suggestion recognizes that there are members of the minority groups who are not enthusiastic about compulsory busing. These parents have the same apprehensions as the majority parents about sending their children into unknown conditions, and perhaps into hostile atmospheres. At the same time, in many instances, they have the same hopes and aspirations for their children as do members of the majority and are willing to make the sacrifice in order to improve the educational opportunity for them.

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[28] This would not, of course, apply to students subject to part I of this opinion and the Integration Resolutions because actual integration is a matter of constitutional law.

Arguably, at least, this method satisfies the Constitution in that it recognizes the right of every student and makes that right available to him without forcing it on him. Comments of the litigants on this will be considered at a further hearing.

E—VOLUNTARY OPEN ENROLLMENT

As to the voluntary open enrollment policy of the school board, certainly they should be free to pursue and develop this to the nth degree. Their position at the trial was that this would ultimately produce integration. One questions whether it would, but if it can be operated successfully, the board should be encouraged to carry it out. It should be noted, however, that this is neither "voluntary" nor is it "open" because it requires that there be spaces available in the transferee school or that there be an exchange program. It seems clear to us that there would be few participants in an exchange program with the core city schools. It seems highly unlikely that students would elect to go to these schools from white neighborhoods and so it is questionable whether any integration would be achieved in a substantial way from this program. On the other hand, the method selected above has no such "catch" in it.

It is contempalted that any decree which is finally promulgated here will not be effective until next fall. On the other hand, the preliminary injunction heretofore entered would continue for the remainder of this school year until next September when the final judgment would be effective. This opinion does not purport to be a judgment for the purpose of appeal. Final judgment will be entered after a meeting with counsel which hopefully can be carried out within the next 30 days.

APPENDIX I: ACHIEVEMENT DATA

ELEMENTARY SCHOOLS

Third grade		*Fifth grade*	
School	*Average median achievement*	School	*Average median achievement*
Barrett	2.81	Barrett	4.73
Boulevard	2.80	Boulevard	4.33
Bryant-Webster	3.16	Bryant-Webster	4.43
Columbine	2.93	Columbine	4.27
Crofton	3.10	Crofton	4.22
Ebert	2.71	Ebert	4.17
Elmwood	3.42	Elwood	4.62
Fairmont	2.85	Fairmont	4.10
Fairview	2.96	Fairview	4.25
Garden Place	2.61	Garden Place	4.16
Gilpin	2.68	Gilpin	4.46
Greenlee	2.93	Greenlee	4.16
Hallett	3.06	Hallett	4.24
Harrington	2.55	Harrington	4.02
Mitchell	2.71	Mitchell	3.90
Smith	3.06	Smith	4.74
Stedman	3.13	Stedman	4.64
Whittier	2.76	Whittier	4.26
Wytt	3.46	Wyatt	4.06
Wyman	3.05	Wyman	4.47

APPENDIX I: ACHIEVEMENT DATA—Continued

JUNIOR HIGH SCHOOLS

School	*Average median percentile score*
Baker	31. 1
Byers	63. 0
Cole	25. 4
Cove	63. 2
Grant	55. 7
Hill	77. 4
Horace Mann	32. 3
John F. Kennedy	71. 4
Kepner	49. 0
Kunsmiller	62. 2
Lake	48. 7
Merrill	74. 1
Morey	30. 2
Rishel	57. 2
Skinner	55. 2
Smiley	42. 9
Thomas Jefferson	75. 6

SENIOR HIGH SCHOOLS

School	*Average median percentile score*
East	54
George Washington	76
John F. Kennedy	73
Abraham Lincoln	59
Manual	30
North	53
South	66
Thomas Jefferson	72
West	35

APPENDIX II: TEACHER EXPERIENCE

School	None	Probation	10 or more years
ELEMENTARY SCHOOLS			
Plaintiffs' 20 selected target schools:			
Barrett	21. 1	31. 6	21. 1
Boulevard	16. 7	50. 0	27. 8
Bryant-Webster	13. 8	34. 5	44. 8
Columbine	27. 3	50. 0	11. 4
Crofton	21. 4	42. 9	28. 6
Ebert	21. 1	42. 1	26. 3
Elmwood	39. 1	39. 1	17. 4
Fairmont	25. 0	78. 6	10. 7
Fairview	10. 3	33. 3	25. 6
Garden Place	18. 4	36. 8	15. 8
Gilpin	25. 0	41. 7	25. 0
Greenlee	12. 5	40. 0	25. 0
Hallett	25. 0	46. 4	28. 6
Harrington	30. 4	73. 9	0
Mitchell	26. 0	44. 0	16. 0
Smith	26. 4	49. 1	7. 5
Stedman	23. 7	39. 5	13. 2
Whittier	27. 3	56. 8	9. 1
Wyatt	13. 6	27. 3	27. 3
Wyman	22. 2	50. 0	16. 7
Total average	22. 5	45. 4	18. 7
Plaintiffs' 20 selected Anglo schools:			
Ash Grove	17. 9	35. 7	21. 4
Bradley	2. 9	11. 8	58. 8
Bromwell	18. 2	18. 2	45. 5
Carson	16. 0	40. 0	48. 0
Cory	0. 0	18. 2	40. 9
Doull	14. 7	20. 6	58. 8
Ellis	9. 1	18. 2	42. 4
Ellsworth	25. 0	62. 5	25. 0
Fallis	7. 7	15. 4	46. 2
Gust	21. 9	40. 6	31. 3
Knight	4. 3	30. 4	56. 5

Appendix II: Teacher Experience—Continued

School	None	Probation	10 or more years
Plaintiffs' 20 selected Anglo schools—Continued			
McMeen	3. 0	24. 2	51. 5
Montclair	0. 0	11. 1	48. 1
Palmer	6. 3	12. 5	75. 0
Pitts	11. 8	29. 4	58. 8
Sabin	8. 0	20. 0	38. 0
Slavens	13. 0	30. 4	52. 2
Traylor	10. 3	20. 7	58. 6
University Park	14. 3	37. 1	48. 6
Washington Park	0. 0	36. 8	36. 8
Total average	9. 8	25. 6	47. 1
ALL JUNIOR HIGH SCHOOLS			
Baker	32. 1	60. 7	10. 7
Byers	14. 0	43. 9	26. 3
Cole	39. 6	65. 9	14. 3
Gove	31. 0	45. 2	19. 0
Grant	19. 5	34. 1	24. 4
Hill	14. 5	33. 7	36. 1
Kopner	14. 5	50. 7	17. 4
Kunsmiller	6. 0	32. 5	32. 5
Lake	10. 6	40. 9	31. 8
Mann	20. 3	55. 9	16. 9
Merrill	16. 2	35. 1	33. 8
Morey	27. 8	53. 7	13. 0
Rishel	16. 7	36. 7	21. 7
Skinner	15. 0	38. 3	23. 3
Smiley	35. 7	63. 3	7. 1
Total average	21. 1	46. 7	22. 0
Target schools:			
Baker	32. 1	60. 7	10. 7
Cole	39. 6	65. 9	14. 3
Morey	27. 8	53. 7	13. 0
Smiley	35. 7	63. 3	7. 1
Total average	34. 8	61. 9	11. 0
Angle schools:			
Hill	14. 5	33. 7	36. 1
Merrill	16. 2	35. 1	33. 8
Total average	15. 3	34. 4	35. 0
ALL SENIOR HIGH SCHOOLS			
Lincoln	8. 3	17. 3	59. 4
East	17. 2	34. 4	36. 7
George Washington	8. 9	17. 0	54. 1
Kennedy	6. 6	15. 4	48. 5
Manual	17. 1	37. 8	32. 4
North	8. 2	29. 1	41. 8
South	8. 2	16. 4	55. 7
Thomas Jefferson	6. 8	22. 2	50. 6
West	14. 5	30. 0	40. 0
Total average	10. 3	24. 0	47. 1

APPENDIX II: TEACHER EXPERIENCE—Continued

School	None	Probation	10 or more years
Target schools:			
East	17. 2	34. 4	36. 7
Manual	17. 1	37. 8	32. 4
West	14. 5	30. 0	40. 0
Total average	16. 3	34. 1	36. 4
Anglo schools:			
George Washington	8. 9	17. 0	54. 1
Kennedy	6. 6	15. 4	48. 5
Thomas Jefferson	6. 8	22. 2	50. 6
Total average	7. 4	18. 5	51. 0

APPENDIX III: PUPIL DROPOUT RATES

	Projected	Annual
Junior high schools:		
Baker	12. 9	4. 5
Byers	3. 8	1. 3
Cole	7. 0	2. 4
Gove	1. 9	. 6
Grant	3. 0	1. 0
Hill	. 7	. 3
Horace Mann	6. 7	2. 6
Kepner	3. 7	1. 5
Kunsmiller	1. 7	. 6
Lake	6. 3	2. 1
Merrill	. 8	. 3
Morey	15. 7	5. 1
Rishel	4. 1	1. 4
Skinner	2. 1	. 8
Smiley	6. 1	2. 1
John F. Kennedy	. 3	. 2
Thomas Jefferson	. 6	. 2
Senior high schools:		
Abraham Lincoln	38. 1	14. 7
East	46. 8	18. 8
George Washington	10. 8	3. 6
Manual	57. 0	24. 4
North	51. 8	21. 9
South	39. 6	15. 3
West	46. 9	19. 5
John F. Kennedy	13. 0	1. 9
Thomas Jefferson	9. 9	1. 7

313 F.Supp. 90 (1970)

MAY 21, 1970

School desegregation case. The district court (313 F. Supp. 61), found that equal education was not being provided at segregated schools. The district court, William E. Doyle, judge, promulgated a plan under which affected schools would be integrated within 2-year period, students would have free transfer with space guarantee during interim period, and compensatory education programs would be provided minority children.

Judgment accordingly.

Barnes and Jensen, by Craig S. Barnes, Holland and Hart, by Gordon G. Greiner, Denver, Colo., Conrad K. Harper, New York City, for *plaintiffs.*

Wood, Ris, and Hames, by William K. Ris, Henry, Cockrell, Quinn, and Creighton, by Thomas E. Creighton, Benjamin L. Craig, Michael Jackson, Denver, Colo., for *defendants*, except John H. Amesse, James D. Voorhees, Jr., and Rachel B. Noel, as *individuals.*

DECISION RE PLAN OR REMEDY

William E. Doyle, district judge.

It is to be recalled that this suit, which has been previously before the court, was instituted as a class action by Negro and Hispano public school students and their parents. Plaintiffs complained that there was de jure segregation in many of the schools in School District No. 1, Denver, Colo., and that an unequal educational opportunity was being provided in the segregated schools within the district. On March 21, 1970, after approximately 3 weeks of trial, this court handed down a memorandum opinion and order finding that certain schools, elementary, junior high, and a high school within an area of Denver known as Park Hill, and also some 15 schools within the core city, were segregated. It was also concluded that our temporary injunction entered in August 1969, finding a condition of de jure segregation in certain schools resulting from the Denver Board of Education's action rescinding Resolutions 1520, 1524, and 1531, which had been designed to have an integrating effect on Park Hill schools, must be made permanent. We ordered full implementation of these resolutions. (D.C. 313 F. Supp. 61.)

A further determination was that certain schools within the core city were segregated as the result of housing patterns and the neighborhood school system; that this constituted de facto segregation and was not unconstitutional per se. A corollary finding and conclusion was that the segregated core city schools in question were providing an unequal educational opportunity to minority groups as evidenced by low achievement and morale. The causes of this inferiority were held to be the segregated condition, together with concentration of minority teachers, low teacher experience, and high teacher turnover in each of the schools. We stated that:

> The present state of the law is that separate educational facilities (of the de facto variety) may be maintained, but a

> fundamental and absolute requisite is that these shall be equal. Once it is found that these separate facilities are unequal in the quality of education provided, there arises a substantial probability that a constitutional violation exists. This probability becomes almost conclusive where minority groups are relegated to the inferior schools.
> (313 F. Supp. at 83.)

We thus concluded that the school district had violated the equal protection clause of the 14th amendment by maintaining and operating schools which deprived the recipients of an equal educational opportunity. Both plaintiffs and defendants were asked to submit plans to remedy the inequality found to exist.

The cause is then presently before us for the purpose of fashioning a remedy which hopefully will establish equality of educational opportunity in the court designated segregated schools.

Both plaintiffs and defendants have submitted lengthy plans for improving educational opportunity and many of the foremost authorities on this subject, both with respect to the Denver area and nationwide, have been called upon to testify.

I—Description of Plans

Plaintiffs' proposed plan involves a three-step process for raising achievement and equalizing educational opportunity. The first step is desegregation, or the elimination of racial isolation of minority students through cross-transportation of pupils. Plaintiffs have concentrated on this phase of the program and the plans for desegregation are, for the most part, the product of computer analysis. The second phase involves integration, which the plaintiffs define as the educational process of promoting mutual respect and understanding among students, teachers, and the community. The final portion of the plaintiffs' plan suggests a system of compensatory education programs, carried out in an integrated environment, designed to equalize achievement.

At the outset we note that plaintiffs urge that the court should reconsider certain schools which plaintiffs consider "target" schools, but which the court found not to be segregated inferior schools. Plaintiffs call attention to the fact that two schools; namely, Elyria and Smedley, are not only inferior in terms of achievement, but also meet the guideline set by the court that the school contain at least 70 to 75 percent Negro or Hispano students. Furthermore, plaintiffs ask us to reconsider at least nine other schools which have a combined minority population of over 70 percent.[1] Failure to include Elyria and Smedley schools was due to oversight. These must now be included in a plan for relief. We have concluded that none of the plans are wholly suitable and that a carefully tailored plan consisting of parts of the submitted ideas should be adopted. Nevertheless, a brief description of the plaintiffs' and defendants' proposals will furnish some understanding of the problem and of this order.

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[1] We concluded in our March 21 opinion that it was not appropriate to place Negroes and Hispanos in one category to arrive at a minority population of over 70 percent. 313 F.Supp. at 69.

Plaintiffs propose four alternative plans for desegregation of elementary schols. The first of these desegregates the court designated elementary schools by a system of cross-busing. The total number of schools involved would be 29; the total number of students to be transported would be 8,380; the average miles traveled per student one-way would be 6.4; the minimum Anglo enrollment at any school designated by the court would total 54 percent.

The second proposed alternative plan calls for enrolling only pupils in grades 4–6 in the 12 court-designated elementary schools. Each of these schools would be paired with one or more Anglo schools which would be used only for grades K–3. This plan would involve 31 schools; 11,109 students would be transported; the average number of miles traveled per student one-way would be 6.3; minimum Anglo enrollment at the court designated schools would be 51 percent.

Plan 3 is similar to plan 1 except that it would include all of plaintiffs' target elementary schools rather than just the court designated elementary schools. It would, of course, require a much greater transportation effort involving as it does numerous schools which the court has not included.

Plan 4 is similar to plan 2, except that all of plaintiffs' target schools are provided with relief.

Alternative plans are submitted by plaintiffs for desegregating junior high schools. The first of these would desegregate Cole Junior High School by reassigning to Cole some 1,038 students already being bused to Thomas Jefferson and John F. Kennedy. Also, students now being bused to Cole would be bused instead to Thomas Jefferson and John F. Kennedy. This plan would increase Anglo enrollment at Cole to 66 percent. The second alternative plan would desegregate not only Cole, but also Horace Mann, Lake, Morey, and Baker Junior High Schools by a system of cross-busing similar to that involved in the first alternative plan.

Plaintiffs also propose alternative programs for equalizing educational opportunity at Manual High School. First, they recommend alteration of the school attendance boundaries of Manual, East, and South, to create long narrow north-south corridors for each of the above schools. This would result in many Anglo students from south Denver attending Manual. As a second alternative, the plaintiffs suggest that Manual be made an open school which could be attended by any student in the district and which would specialize in vocational and preprofessional training. This plan is essentially the same as that proposed by the board with respect to Manual.

Finally, plaintiffs have suggested several programs which would aid in creating cultural understanding and respect as well as programs for equalizing educational opportunity through compensatory education. These include faculty and staff inservice training and orientation, programs for community involvement, use of paraprofessionals, tutorial systems, individualized instruction, increased preschool training, and others which are very similar to the school board's suggestions, except that under plaintiffs' plan, desegregation constitutes an essential first step.

The defendants' program for equalizing educational opportunity in the court-designated schools is basically one of compensatory education, with little emphasis on desegregation. Defendants offer some opportunity for mixing of the races, in that pupils at the 15 court-designated schools could transfer to a school of their choice on a space guaranteed basis with transportation provided by the district, if the transfer will improve racial balance. This is similar to our suggestion in the March 21, 1970, opinion and it differs from the earlier school board VOE program since the availability of space at a receiving school is not a precondition to transfer.

The remaining of defendants' offerings deal with various forms of compensatory education. Its first section outlines proposals for staffing. There would be encouragement and incentives to induce good teachers to work at the core city schools by extension of the school year and increased teacher compensation. An effort would be made to integrate teaching and administrative staffs. Teacher aides and paraprofessionals would be employed so that teacher time could be utilized more efficiently, there would be human relations training for all school district employees, and teachers would receive instruction in preparation for assignment to target schools.

Educational complexes, as described in the plan, are currently in preparation. A complex would include a basic neighborhood school with special programs at other schools in the cluster. Subjects, activities, and services offered at the complex would be oriented to the requirements of the community in which the complex is located.

Defendants' plan also recognizes the importance of the early development of a child, and the need to reach minority children at an early stage. Programs such as Headstart now being used would continue. Those programs currently in use deal with children from 3 years old to the first grade in certain areas of the city, and a proposed National Follow Through program will work with children through the third grade.

Defendants' plan also describes special programs currently in progress or proposed for Cole Junior High School and Manual High School. The efforts at Cole include the use of laboratory approaches in all academic areas; use of inservice training; use of tutors and student aides; increased counseling efforts; a work-study program; and an extension center and a "crisis room" to be used with students who do not adjust well to a regular classroom setting and are potential dropouts or subjects for suspension from school. The programs at Manual include extensive vocational skills and preprofessional courses and advanced placement opportunities.

At present, funds are available under Colorado Senate bill 174 for children whose reading skills are 2 or more years below their grade level. Current S.B. 174 financed programs are in effect at Fairview Elementary School, and Baker and Cole Junior High Schools. State appropriations are expected to permit the continuation of these programs.

Finally, defendants list a number of innovative practices. These would emphasize the active, rather than passive elements of learning, recognizing that pupils will vary in their rate of learning based on their ability, background, and other factors; efforts would be made to avoid practices which might degrade the child, such as underestimating his ability or denigrating his background or family (no matter how subtly or unconsciously done); and an effort would be made to supply an attractive climate for learning—attractive buildings and classrooms, good interpersonal relationships between parents, pupils, and teachers, excursions into places of greater interest and so forth are all contemplated in this type of program.

II—THE TESTIMONY

The crucial factual issue considered was whether compensatory education alone in a segregated setting is capable of bringing about the necessary equaling effects or whether desegregation and integration are essential to improving the schools in question and providing equality. The evidence of both parties has been directed to this question.

Plaintiffs' evidence focused directly on the proposition that desegregation is essential in improving the quality of educational opportunity in the court designated schools and that compensatory programs of the type proposed by the defendants cannot work in a segregated setting.

Dr. James Coleman, professor of social relations at Johns Hopkins University and author of the Coleman report on equality of educational opportunity, testified that isolation of children from low socioeconomic families creates an atmosphere which inevitably results in an inferior educational opportunity. Dr. Coleman stated that a child's ability to learn is significantly affected by the educational stimulation provided by his family. Since Negro and Hispano children from low socioeconomic families are typically not provided with this stimulation, a compensating stimulation must be provided by the peer group in the school. Where all children in the school come from families with similar low socioeconomic status, the negative effect produced by family background is reinforced rather than alleviated. Dr. Coleman testified that although a racially isolated school is not inferior per se, it will inevitably provide an unequal educational opportunity where the racial or ethnic isolation involves a homogeneous student body all from uneducated and deprived backgrounds.

Dr. Neil Sullivan, who is now Commissioner of the Massachusetts State Board of Education and who installed the Berkeley desegregation plan in Berkeley, Calif., testified that in his opinion it was racial segregation itself, rather than isolation of children from low socioeconomic families, which caused the inferiority of educational opportunity. Dr. Sullivan stated that Berkeley had attempted to improve racially segregated schools by massive programs of compensatory education including lowering the teacher-pupil ratio, improving equipment and materials, and instituting cultural enrichment programs. These programs had little effect on student achievement. It was Dr. Sullivan's expert opinion that any effort at compensatory education must be correlated with desegregation if it is to achieve positive results. He also stated that a program of desegregation similar to that used in Berkeley required 2 years of preparation and planning.

Dr. Sullivan's testimony was reinforced by the testimony of Dr. Robert O'Reilly. Dr. O'Reilly, the assistant director of research and evaluation for the New York State Department of Education, has made the most extensive study of compensatory education programs on a national scale currently available. He explained that most compensatory programs include such items as lowering teacher-pupil ratio, use of paraprofessionals, inservice teacher and staff training programs, individualized tutoring, and cultural enrichment courses. He concluded from this study that compensatory education carried on in a segregated atmosphere had little or no effect on raising achievement. Dr. Sullivan conceded desegregation in and of itself is not a cure-all, but in an essential step in improving educational opportunity and that compensatory programs are important and probably useful, but only if conducted in a desegregated setting.

The main witness for the defendants was Dr. Robert Gilberts, superintendent of schools for school district No. 1. Dr. Gilberts explained the defendants' proposed plan and offered a critique of the plaintiffs' suggested program. He stated that low achievement among children in the court designated schools was the result of a number of factors, including home situation, lack of discipline, absence of stimulation by parents, and verbal deficiencies resulting from the families' limited vocabulary. Although Dr. Gilberts was the developer of resolutions 1520, 1524, and 1531, designed to desegregate schools in Park Hill, he indicated that this was merely a pilot project. He maintained that there is no affirmative evidence that desegregation would aid in providing an equal educational opportunity for minority children. Furthermore, Dr. Gilberts expressed doubt that desegregation could be successful without broad community support.[2]

The defendants' plan, as explained by Dr. Gilberts, is designed to reconstruct the educational climate by such programs as differential staffing, improved inservice training for teachers and staff, special innovative programs of vocational and preprofessional training at Manual High School, and to some extent at Cole Junior High School, and increasing the number of experienced teachers at the court-designated schools. A program similar to the present voluntary open enrollment would be instituted, but with a guaranteed open space provision so that any student in the district might transfer to another school with transportation provided by the district if the transfer would improve the racial balance of both receiving and sending schools. Within the next 2 years a portion of the "complex system" will be initiated in Denver. Dr. Gilberts admitted, however, that only the new VOE program was specifically designed to provide some measure of desegregation. For the most part the defendants' programs are to be carried out in a substantially segregated setting.

Defendants also called Messrs. Ward, Morrison, and Rehmer, the principals of Manual High School, Cole Junior High School, and Bryant-Webster Elementary School, respectively.

Mr. Ward testified that he had initiated several innovative programs at Manual since becoming principal. These included work-study vocational training in areas such as building trades, metal work, power and transportation, and home economics. He also testified that preprofessional studies were instituted. These are designed to familiarize pupils with occupational fields such as law, medicine, education, and engineering. Although there was no evidence that these innovative programs improved the academic achievement of Manual students,

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[2] We agree that community support is essential, but this, of course, requires a community education program—indeed a campaign.

Mr. Ward stated that they had intensified interest among students in remaining in school.

Mr. Morrison has also begun certain innovative programs at Cole Junior High School. These include the use of laboratory approaches in all academic areas, tutors and student aides, work-study programs and the "crisis room" and extension center. He testified that these approaches have succeeded in restoring student and community confidence in the school. The result of these programs on academic achievement has not yet been determined. It does appear though that Cole Junior High is now being used as a specialty school.

Mr. Rehmer has instituted new programs at Bryant-Webster which are basically compensatory in nature, and have achieved some success in reviving student interest. This is a predominantly Spanish elementary school in which compensatory reading and some Spanish-oriented programs have been stressed.

Finally, these principals agreed that their programs could be carried out in an integrated setting and that desegregation of their schools would substantially improve the educational opportunity for their students.

III—ISSUES OF LAW

Before discussing our determinations of fact we must mention that there are present herein two novel questions of law.

The first of these is discussed in the memorandum opinion and order of March 21, 1970. This is the question whether a condition of de facto segregation is to be remedied in the same manner as a condition of dejure segregation. We found at the trial that the schools in question became segregated as a result of neighborhood housing patterns—at least that this was the substantial factor in producing the result. It was not caused by positive law or as a result of official action. In the present state of the law, particularly in this the 10th circuit, we were of the opinion that desegregation could not be decreed in these circumstances. Undoubtedly this question will receive attention in higher courts at the behest of one or both of the parties and we do not pursue it.

The second question is one of both law and fact, but is predominantly to be determined from the evidence. It is whether in a setting of grossly inferior minority schools, compensatory education—improvement of the minority schools, together with a free transfer policy such as that suggested in the March 21, 1970, opinion—constitutes a constitutionally acceptable remedy or whether in order to in truth improve the schools and to thus satisfy the requirements of the Constitution, it is necessary to prescribe and implement also a program of desegregation and integration. We have concluded after hearing the evidence that the only feasible and constitutionally acceptable program—the only program which furnishes anything approaching substantial equality—is a system of desegregation and integration which provides compensatory education in an integrated environment. We have, however, delayed its being carried into effect for 1 year (for part of the program) and for 2 years (for the remainder). We have directed the adoption of an interim program such as that suggested in the March 21, 1970 opinion.

IV—FINDINGS AND GUIDELINES

1. The overwhelming evidence in this case supports the finding and determination which we now make that improvement in the quality of education in the minority school can only be brought about by a program of desegregation and integration. This is the positive conclusion of Drs. Coleman, Sullivan, and O'Reilly, all of whom are authorities in the field. Their opinions are supported by extensive, comprehensive, in-depth studies and, in some instances, actual experience in the field.

2. The evidence clearly establishes that the segregated setting stifles and frustrates the learning process. One of the expert witnesses made the matter clear when he said that the isolation of any group develops a homogeneous mass which brings out the worst in the individual members and establishes a low standard of achievement. When, in addition, the group is from a socioeconomic group which is deficient, the bad results are intensified. Add to this the minority factor with the attendant lack of pride and hope, and the task of raising achievement levels becomes insurmountable. The minority citizens are products, in many instances, of parents who received inferior educations and hence the home environment which is looked to for many fundamental sources of learning and knowledge yields virtually no educational value. Thus, the only hope for raising the level of these students and for providing them the equal education which the Constitution guarantees is to bring them into contact with classroom associates who can contribute to the learning process; it is now clear that the quality and effectiveness of the education process is dependent on the presence within the classroom of knowledgeable fellow students.

3. To seek to carry out a compensatory education program within minority schools without simultaneously developing a program of desegregation and integration has been unsuccessful. Experience has shown that money spent in these programs has failed to produce results and has been, therefore, wasted. The ideal approach, and that which offers maximum promise of success, is a program of desegregation and integration coupled with compensatory education. Desegregation in and of itself cannot achieve the objective of improving the quality of the education in schools. It must be carried out in an atmosphere of comprehensive education and preparation of teachers, pupils, parents, and the community. It also must be coupled with an intense and massive compensatory education program for the students if it is to be successful.

4. A system of free transfer to designated Anglo or white schools of minority groups furnishes a minimal, but at the same time an insufficient, fulfillment of the constitutional rights of the persons involved. True, such a method furnishes some relief to the individuals who choose to exercise it, but here again it promises little unless it is accompanied by a careful, painstaking program of compensatory education because here, without the support, the individual is alone in an environment which is much more difficult and competitive than either the segregated or integrated one. It should be used then as an interim measure. It will serve to minimize the deprivation during the period of planning and preparation for a permanent system.

5. As a prelude to a program of integration, the court designated minority schools must be drastically improved. The inequity implicit in sending majority students to a grossly inferior school was noted in our March 21, 1970, opinion. Substantial correction of these conditions is, therefore, a necessity.

V—Provisions of the Plan

In our opinion of March 21, 1970, we recognized the underlying constitutional basis for this decision, which is that a State or its subdivision may not constitutionally maintain any program which treats members of minority groups unequally as compared with other groups. It makes no difference that the system may appear to be equal on its face, if its operation in fact results in unequal treatment. Further, when a court finds that such inequality of treatment exists, it is constitutionally bound to provide a remedy which will wipe out the inequality "root and branch."

Having found, in accordance with the overwhelming weight of the evidence, that the racial isolation of Negro and Hispano children which exists in the 15 schools designated in this court's opinion of March 21, 1970, together with Elyria and Smedley Elementary Schools, is the primary factor producing inequality of educational opportunity at those schools and that this inequality can be remedied only through a combined program of desegregation, together with a massive program of compensatory education, and having further concluded that neither the plans submitted by plaintiffs nor those of defendants are wholly satisfactory, we, therefore, now delineate the guidelines of the plan which, based on the evidence and the law, satisfies the Constitution and, at the same time, holds some promise of acceptance and success.

A. SUMMARY

The plan calls for desegregation of the court designated elementary schools (grades 1 through 6) including Smedley and Elyria Schools. Part of this is to be accomplished on or before September 1, 1971, and the remainder is to be carried out not later than September 1, 1972. The detailed plan, including the exchanges which will be necessary, is not adopted now because it is believed that further study must be made. Baker Junior High School is also to be desegregated. A substantial part of the desegregation program must be completed on or before September 1, 1971, and complete desegregation and integration is to be accomplished on or before September 1, 1972.

Cole Junior High is also to be desegregated and integrated on or before the same dates applicable to Baker. This can be accomplished by making Cole a specialty school if the board of education determines that this is more feasible.

Manual High School is to become a specialized city high school which will offer preprofessional and particular college preparation courses. It will also offer, in accordance with the board's plan, a variety of work-study programs designed to develop talent in arts and trades.

The compensatory education program and the free transfer programs of the board are also part of the plan.

B. ELEMENTARY SCHOOLS

At least 50 percent of the court designated elementary schools, grades 1 through 6, including Elyria and Smedley Elementary Schools, must be desegregated by fall of 1971.

Complete desegregation of all court designated elementary schools, grades 1 through 6 must be accomplished by the beginning of school in the fall of 1972. We consider complete desegregation fulfilling the constitutional requirement to be accomplished when each of the above schools has an Anglo composition in excess of 50 percent. Although it is probably not constitutionally required, the desirability of having the minority student population in each of these schools apportioned equally between Negro and Hispano children is apparent.

Because the plaintiffs and the school district have the expertise necessary for devising a system of school redistricting and transportation to achieve the result set forth above, we leave these details to them. But we stress that the details of the scheme must be carefully examined and checked, having in mind that the program is a human one. While the computers can be useful in such an effort, their results must be checked with care to prevent unnecessary burden to the persons involved. The final details will be subject to review by the court. We have, of course, been reluctant to decree mandatory transportation, and it should be avoided to the extent possible.

C. JUNIOR HIGH SCHOOLS

Substantial progress must be made in desegregating Baker Junior High School by fall of 1971. Complete desegregation of Baker Junior High School along the lines set forth above for elementary schools must be effectuated by the beginning of the school year in the fall of 1972.

Cole Junior High School

The board is directed to adopt one of two alternative plans. First, the board of education may desegregate Cole. If this alternative is adopted, substantial progress must be made in desegregating Cole by fall of 1971, with complete desegregation of Cole Junior High by the beginning of the school year in the fall of 1972. The second alternative is to establish Cole by fall of 1971 as an open school for special education and other special programs now in effect or which the school board may wish to put into effect in the future. Under this second alternative, those students who would have attended Cole in the 1971–72 school year, but who do not wish to participate in the special programs offered at Cole, may transfer with a guarantee of space to another junior high school. It should be open to students from other parts of the city in furtherance of the special programs. A basic assumption is that the desegregation and integration policies here enunciated will be accomplished regardless of which scheme is adopted for Cole.

D. MANUAL HIGH SCHOOL

We approve and order implementation of the plans set forth by the defendants and plaintiffs for establishing Manual as an open school for the continuation and expansion of the vocational and preprofessional training programs which have been instituted by the principal, the faculty, and staff. If this program develops and transforms Manual to an outstanding institution capable of attracting and accommodating students from the entire city, an integration program would be superfluous.

E. PREPARATION

Between now and the beginning of school in fall 1971, and continuing through fall of 1972, an intensive program of education must be carried out within the community and the school system in preparation for desegregation and integration. This should include at least a program for orienting teachers in the field of minority cultures and problems and how to effectively deal with minority children in an integrated environment. A similar program should be undertaken for staff and administrators. It will also be necessary to educate the community as to the educational benefits and values, not only for the children but also for the community, to be derived from desegregation and integration.

F. FREE TRANSFER

Between now and the fall of 1971, as an interim measure only, we approve the board of education's program for VOE with a guaranteed space provision, and it shall be so implemented with respect to all court designated schools including Elyria and Smedley Elementary Schools.

G. COMPENSATION EDUCATION

We approve of the Board's plans for compensatory education programs for minority children. At a minimum these programs should include:

1. Integration of teachers and administrative staff;
2. Encouragement and incentive to place skilled and experienced teachers and administrators in the core city schools;
3. Use of teacher aides and paraprofessionals;
4. Human relations training for all school district employees;
5. Inservice training on both districtwide and individual school bases;
6. Extended school years;
7. Programs under Senate bill 174;
8. Early childhood programs such as Headstart and Follow Through;
9. Classes in Negro and Hispano culture and history; and
10. Spanish language training.

All of the above programs, including several others, are now included in the defendants' plan. These programs for compensatory education are to be initiated for the 1970–71 school year. Those programs which are already in effect should be continued in the 1970–71 school year, with any modifications which the board of education deems necessary in order to carry out this order.

VI—CONCLUDING REMARKS

We are mindful that the task of the school district is a difficult and complex one. Constitutional standards must, of course, be met at the earliest feasible time, but a program which is too hastily conceived and developed could fail to achieve its goals. In view of the essential preparation and planning which must go into a program of this magnitude, it is felt that a 2-year period within which to accomplish desegregation and integration is reasonable, particularly in light of the fact that the plan calls for substantial progress to be made during the year 1971–72.

We have noted the desirability (even though it is not constitutionally mandated) of having both Negroes and Hispanos in the desegregated schools on as close to an equal basis as possible. If integration and desegregation are to have the maximum salutary effect, it would seem to follow that schoolchildren be exposed to all racial and ethnic groups which make up the larger community in which they live. True integration is not likely to occur in Denver if Negroes and Hispanos are separated in the public educational system, no matter how innocently the separation has come about.

It is also to be noted that only grades 1 through 6 of the elementary schools are covered in the court's plan. Kindergarten students are excluded. In the present de facto segregation circumstances in which the effort is improvement, we assume that we have some discretion. Although it may have some value to desegregate children at that early age, it must be kept in mind that their schoolday is shorter than that of the older children. Mandatory transportation, which may well be necessary to effectuate much of the court's plan, seems impractical. It seems preferable to wait until that child is on a schedule more closely aligned with that of the other students at his school. Furthermore, because of the tender years of the kindergartners, it appears somewhat dubious whether the value to be gained is sufficient to justify placing these infants in this extraordinary setting.

Finally, we cannot predict with any degree of certainty how successful the free transfer or open enrollment program will be. However, the evidence at the hearing was not encouraging. On the other hand, it may surprise us. Indeed, there is no assurance that the program here prescribed will fully succeed. Its success will depend in large part on the effort which is expended and on the spirit in which the endeavor is carried out.

All adjudications in the case have now been completed and a final judgment can be entered. The remaining detail is a matter requiring the closest scrutiny and study which will require many months. There being no further substantive matter to decide, there is no just cause for delay and the entire matter can now be appealed.

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445 F.2d 990 (1971)

JUNE 11, 1971

Suit wherein parents of children attending public schools sued individually, on behalf of their minor children, and on behalf of class of persons similarly situated, to remedy alleged segregated condition of certain schools and effects of that condition. The U.S. District Court for the District of Colorado, William E. Doyle, judge (313 F. Supp. 61 and 313 F. Supp. 90), entered judgment in favor of plaintiffs on first claim, and in favor of defendants on all but one count of second claim, and defendants appealed, and plaintiffs cross-appealed. The court of appeals, Hill, circuit judge, held that it was unable to locate a firm foundation upon which to build a constitutional deprivation of rights by virtue of fact that designated core area schools, not segregated by State action, were offering an unequal educational opportunity and was compelled to abstain from enforcing trial court's plan to desegregate and integrate such schools. It was further held that there was ample evidence in record to sustain trial court's finding that race was made basis for school districting with purpose and effect of producing substantially segregated schools in another area; however, plaintiffs failed in their burden of proving a racially discriminatory purpose and a causal relationship between acts complained of and racial imbalance admittedly existing in such schools.

Affirmed in part, reversed in part, and remanded.

Gordon G. Greiner, Denver, Colo. (Conrad K. Harper, New York City, on the brief), for Keyes, and others.

William K. Ris, Denver, Colo. (Benjamin L. Craig and Michael H. Jackson, Denver, Colo., on the brief), for School District No. 1, and others.

Before Pickett, Hill, and Seth, U.S. circuit judges.

Hill, circuit judge.

This is a suit in which the parents of children attending Denver public schools sued individually, on behalf of their minor children, and on behalf of classes of persons similarly situated, to remedy the alleged segregated condition of certain Denver schools and the effects of that condition. The school district, the present board of education and its superintendent were all named as defendants. The action was brought under 42 U.S.C. 1983, 1985, 28 U.S.C. 1343 (3), (4), and the 14th amendment of the U.S. Constitution seeking to enjoin defendants from maintaining, requiring, continuing, encouraging, and facilitating separation of children and faculty on the basis of race, and further from unequally allocating resources, services, facilities and plant on the basis of race. Declaratory relief was also sought under 28 U.S.C. 2201. On appeal, defendants appear as appellants and cross-appellees, and plaintiffs appear as appellees and cross-appellants.

The reported background is extensive, In July 1969, appellees' motion for preliminary injunction was granted in an opinion found at 303 F. Supp. 279. The motion sought to enjoin the rescission of Resolutions 1520, 1524, and 1531. The preliminary injunction was appealed and was remanded by this court for further findings and consideration of additional questions. Thereafter, the preliminary injunction was supplemented and modified at 303 F. Supp. 289. The decision on the merits is recorded at 313 F. Supp. 61, and the remedies are set forth in an opinion at 313 F. Supp. 90.

The complaint set out two separate causes of action. The first cause contained six counts, all of which pertained to recission of School Board Resolutions 1520, 1524, and 1531. Therein the plaintiffs alleged that these resolutions were an attempt by the school board to desegregate and integrate the public schools of northeast Denver, and that the rescission of these resolutions was unconstitutional because the purpose and effect was to perpetuate racial segregation in the affected schools. In connection with this cause of action, plaintiffs urge that the rescission of these resolutions was unconstitutional because thereby. The second cause of action contained three counts that are pertinent here. The first count, in effect, alleged that through affirmative acts the defendants and their predecessors deliberately and purposely created and maintained racial and ethnic segregation in the so-called core area schools within the district. The second count, in effect, alleged that the defendants had purposely maintained inferior schools by their method of allocation to the schools, and such practice has caused those schools to be substantially inferior to other schools within the district with predominantly Anglo students. The effect of such practice, plaintiffs urged, denied the minority students an equal educational opportunity in violation of the equal protection clause of the 14th amendment. The third count was an attack upon the school district's neighborhood school policy. They urge such policy to be unconstitutional because it results in segregated education.

In substance, the trial court found and concluded as to the first claim that the named schools in northeast Denver were segregated by affirmative State action. In its findings, the trial court noted specific instances of boundary gerrymandering, construction of a new school and classrooms, minority-to-majority transfers, and excessive use of mobile classroom units in this section of the district, all of which amount to unconstitutional State segregation. In addition, it was held that the adoption of Resolutions 1520, 1524, and 1531 was a bona fide attempt by the board to recognize the constitutional rights of the students affected by prior segregation, and that the act of repudiating these resolutions were unconstitutional State action resulting in de jure segregation. As to the second claim, on the first count, the court found that the acts complained of in the core area were not racially inspired, and accordingly the allegations of de jure segregation were not accepted. On the second count, the court found that although the core area schools were not segregated by State action, 15 designated schools should be granted relief because it was demonstrated that they were offering their pupils an unequal educational opportunity in violation of the 14th amendment equal protection cause. Upon findings that the Denver neighborhood school policy had been constitutionally maintained under the standards set forth in *Board of Education of Oklahoma City Public Schools, Independent Dist. No. 89* v. *Dowell* (375 F. 2d 158 (10th Cir. 1967)), and *Downs* v. *Board of Education of Kansas City* (336 F. 2d 988 (10th Cir. 1964)), relief on the third count was denied.

On appeal in No. 336–70, appellants attack the findings and conclusions as to the first claim and the second count of the second claim. In the cross-appeal No. 337–70, the Keyes class urge error in the findings and conclusions regarding the first and third counts of the second claim.

Appellants' initial argument in No. 336–70 makes a twofold attack on the findings and conclusions regarding the existence of de jure segregation in the schools located in Denver's northeast sector. First, it is contended that under a proper application of the law, the evidence will not support a finding of de jure segregation. Second, appellants argue that the act of rescinding resolutions 1520, 1524, and 1531 was not an act of de jure segregation.

A complete understanding and resolution of the issues presented by appellants requires a survey of the events which preceded the board's action in rescinding the three resolutions. In the 92 elementary schools, 16 junior high schools, and nine senior high schools. There has never been a law in Colorado requiring separate educational facilities for different races. The policy to which the school board has consistently adhered is the neighborhood school plan. The goal is a centrally located school which children living within the boundary lines must attend. Although the board has no written policy governing the setting of attendance boundaries, several factors have apparently been employed. Among these are current school population in an attendance area, estimated growth of pupil population, the size of the school, distance to be traveled, and the existence of natural boundaries. The board also attempts to draw junior high school and senior high school boundary lines so that all students transfering from a given school will continue their education together.

On several occasions during the 1960's, the board formed committees to study the equality of educational opportunities being provided within the system. In 1962, the Voorhees committee was assigned the onerous task. That group recognized that in a school district where there are concentrations of minority racial and ethnic groups, the result of a neighborhood school system may be unequal educational opportunities. Therefore, they recommended that the school board consider racial, ethnic, and socioeconomic factors in establishing boundaries and locating new schools in order to create heterogeneous school communities. The recommendations were apparently ignored.

Thereafter, in May 1964, the board passed Policy 5100 which also recognized that the neighborhood school plan resulted in the concentration of some minority racial and ethnic groups in certain schools. Rather than abandon the neighborhood school concept, however, the board decided to incorporate "changes or adaptations which result in a more diverse or heterogeneous racial and ethnic school population, both for pupils and for school employees." But nothing of substance was accomplished.

In 1966, the Berge committee was formed to examine board policies with regard to the location of schools in Northeast Denver and to suggest changes which would lead to integration of Denver students. This committee recommended that no new schools be built in Northeast Denver; that a cultural arts center be established for student use; that educational centers be created; and that superior educational programs be initiated for Smiley and Baker Junior High Schools. Again, the recommendations were not effected.

In 1968, the board passed the Noel resolution which again formally recognized the problem of concentrated racial and ethnic minority school populations in Northeast Denver and the possibility of resulting unequal educational opportunities. The resolution directed the superintendent of schools to submit to the board a comprehensive plan for integrating the Denver schools. A plan was submitted and, after a 4-month study, Resolutions 1520, 1524, and 1531 were passed. In essence, each of these resolutions sought to spread the Negro populations of these schools to numerous schools by boundary changes, thereby achieving what has been described as racial balance in all of them so that their predominantly Negro populations would become roughly 20 percent and white students from other areas would produce an Anglo population in each school of about 80 percent. Resolution 1520 made changes in attendance areas of secondary schools; Resolution 1524 dealt with both secondary schools and junior high schools; and Resolution 1531 changed attendance areas of the elementary schools.

However, before full implementation of the resolutions could be accomplished, a board election was held. Two candidates who promised to rescind the resolutions were elected, and thereafter the board did rescind Resolutions 1520, 1524, and 1531. In their place, Resolution 1533 was passed which basically provided for a voluntary exchange program between the Northeast elementary schools and other elementary schools of the district. Shortly thereafter, this suit was initiated.

The schools of concern to this argument are located in Northeast Denver in what is generally referred to as the Park Hill area. The schools are East High School, Smiley and Cole Junior High Schools, Barrett, Stedman, Hallett, Park Hill, and Philips Elementary Schools. Prior to 1950, the Negro population was centered in the Five Points area, near the northwest corner of City Park. Since 1940, the Negro population has steadily increased from 8,000 to 15,000 in 1950, to 30,000 in 1960, and to approximately 45,000 by 1966. The residential movement reflecting this growth has been eastward, down a "corridor" which has fairly well defined north-south boundaries. In the early 1950's, York Street (some 16 blocks west of Colorado Boulevard) was the east boundary of the residential expansion. Ten years later, the movement had reached and crossed Colorado Boulevard to a limited degree, and now the corridor of Negro residences extends from the Five Points area to the eastern city limits. The schools of concern are in and adjacent to this narrow strip of Negro residences.

Barrett Elementary is located one block west of Colorado Boulevard in the heart of the Negro community. When it opened in 1960, the attendance lines were drawn to coincide almost precisely with the then eastern boundary of the Negro residential movement—Colorado Boulevard. When the school was being planned in 1958 and the sites for construction were being considered, the area west of Colorado Boulevard was already predominantly Negro; by 1960, when the school opened, the racial composition of the neighborhood which it was to serve was reflected in the 89.6 percent Negro student enrollment. In 1970, the racial and ethnic composition of the school was approximately 93 percent Negro, 7 percent Hispano.

In addition, Barrett was built to accommodate only 450 students, a factor which manifestly precluded its use to substantially relieve the overcrowded conditions at adjacent schools. In 1960, Stedman (then predominantly Anglo), which was eight blocks due east of Barrett, was well over its intended capacity. Rather than constructing a larger physical plant at Barrett to accommodate part of Stedman's overflow, Barrett's size was restricted to serve only those pupils west of Colorado Boulevard.

The trial court held that:

> . . . the positive acts of the board in establishing Barrett and defining its boundaries were the proximate cause of the segregated condition which has existed in that school since

> its creation, which condition exists at present. . . . The action of the board . . . was taken with knowledge of the consequences, and these consequences were not merely possible, they were substantially certain. Under such conditions we find that the board acted purposefully to create and maintain segregation at Barrett.
> (303 F. Supp. at 290–291.)

In 1960, Stedman was 96 percent Anglo, 4 percent Negro, and was 20 percent above capacity. By 1962, it was 35 to 50 percent Anglo and 50 to 65 percent Negro. In 1963, it was 87.4 percent Negro and 18.6 percent Anglo, and still overcrowded. By 1968, this school was 94.6 percent Negro and 3.9 percent Anglo. Stedman is eight blocks due east of Barrett, and in 1960 the residential trend all but insured that in a few years it would be predominantly Negro. In 1962, three boundary changes were proposed to the board which would have transferred students from Stedman to Smith, Hallett, and Park Hill, each of which was predominantly Anglo. These three proposals were refused by the board. In 1964, the board made two boundary changes which affected Stedman:

> 1. A predominantly Anglo section of Stedman's school zone was detached to Hallet; and
> 2. The Park Hill-Stedman optional zone (96 percent Anglo) was transferred to Park Hill.

To facilitate an expanding population at Stedman, which was overwhelmingly Negro, mobile units were erected.

The trial court held:

> The actions of the board with respect to boundary changes, installation of mobile units and repeal of Resolution 1531 shows a continuous affirmative policy designed to isolate Negro children at Stedman and to thereby preserve the "white" character of other Park Hill schools.
> (303 F. Supp. at 292.)

In 1960, Park Hill and Philips Elementary Schools were predominantly Anglo. In 1968, Park Hill was 71 percent Anglo, 23.2 percent Negro and 3.8 percent Hispano; Philips was 55.3 percent Anglo, 36.6 percent Negro and 5.2 percent Hispano. Notwithstanding the Negro movement into this area, these two schools have continued to maintain a majority of Anglos in the study body.

The court stated:

> In light of the natural and probable segregative consequences of removing the stabilizing effect of Resolution 1531 on Park Hill and Philips and reestablishing the original district boundaries, the board must be regarded as having acted with a purpose of approving those consequences.
> (303 F. Supp. at 292–293.)

In 1960, Hallett Elementary was 99 percent Anglo; in 1968 it was 90 percent Negro, 10 percent Anglo. The school is about 12 blocks due east of Stedman. When the Stedman boundary changes were considered in 1962, Hallett was under capacity and was 80 to 95 percent Anglo. The results of the boundary changes, had they occurred, would have brought Hallett up to capacity and would have had an integrative effect on the latter school. The 1964 Stedman boundary change that sent the predominantly Anglo section of Stedman to Hallett resulted in an 80 percent Anglo section of Hallet's attendance area being transferred to Philips. The effect of the Hallett-to-Philips transfer was a reduction in Anglo pupils at Hallett from 68.5 to 41.5 percent. By 1965, when four mobile units were built and additional classrooms constructed, Hallett was 75 percent Negro.

The court said:

> The effect of the mobile units and additional classrooms was to solidify segregation at Hallett increasing its capacity to absorb the additional influx of Negro population into the area.
>
> (303 F.Supp. at 293.)

The feeder schools for Smiley Junior High School are Hallett, Park Hill, Smith, Philips, Stedman, Ashley, and Harrington. By the established residential trend, Smiley will soon be all Negro. In 1968 there were 23.6 percent Anglo, 71.6 percent Negro and 3.7 percent Hispano, and there were 23 minority teachers. Only one other school in the entire Denver system, Cole Junior High, had more than six minority teachers. The court held:

> The effect of this repeal [of Resolutions 1520 and 1524] was to reestablish Smiley as a segregated school by affirmative board action. At the time of the repeal, it was certain that such action would perpetuate the racial composition of Smiley at over 75 percent minority and that future Negro population movement would ultimately increase this percentage. . . . We, therefore, find that the action of the board in rescinding Resolutions 1520 and 1524 was willful as to its effect on Smiley.
>
> (303 F. Supp. at 29.4.)

In 1969, East High School was 54 percent Anglo, 40 percent Negro and 7 percent Hispano. The court held that neither before nor after the passage of Resolution 1520 could East be considered segregated. But "[r]escission of these resolutions might, through the feeder system, result in a segregated situation at East in the future." (303 F. Supp. at 294.) In the opinion at 313 F. Supp. 61, 67, the trial court extended its findings of de jure segregation to East High and Cole Junior High:

> The effect of the rescission of Resolution 1520 at East High was to allow the trend toward segregation . . . to continue unabated. The rescission of Resolution 1524 as applied to Cole Junior High was an action taken which had the effect of frustrating an effort at Cole which at least constituted a start toward ultimate improvement in the quality of the educational effort there. . . . We must hold then that this frustration of the board plan which had for its purpose relief of the effects of segregation at Cole was unlawful.

Thus the issue is whether, under applicable constitutional principles, the board has acted with regard to the Park Hill area schools in a manner which violates appellees' 14th amendment rights. This controversy was tried to the district court without a jury. On the basis of the testimony and exhibits produced at that trial, the court made findings of fact and conclusions of law. To the extent that appellants' or cross-appellants' arguments rest upon a relitigation or reassessment of factual matters, rule 52 F.R.Civ.P. 28 U.S.C. requires us to defer to the findings of the trial court unless we are satisfied that they are clearly erroneous. *Mitchell* v. *Texas Gulf Sulphur* (—— F.2d —— (10th Cir. 1971)); *Firemen's Fund Insurance Company* v. *S. E. K. Construction Company, Inc.*, (436 F.2d 1345 (10th Cir. 1971)).

We begin with the fundamental principle that State imposed racial segregation in public schools is inherently unequal and violative of the equal protection clause. *Swann* v. *Charlotte-Mecklenburg Board of Education* (402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971)); *Brown* v. *Board of Education* (347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)); *Downs* v. *Board of Education of Kansas City* (336 F.2d 988 (10th Cir. 1964)). This 14th amendment prohibition against racial discrimination in public schools is not limited to the action of state legislatures, but applies with equal force to any agency of the State taking such action. *Cooper* v. *Aaron* (358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed. 2d 5 (1958)). And we can perceive no rational explanation why State imposed segregation of the sort condemned in *Brown* should be distinguished from racial segregation intentionally created and maintained through gerrymandering, building selection and student transfers. *Taylor* v. *Board of Education of City School District of City of New Rochelle* (294 F.2d 36 (2nd Cir. 1961)).

Appellants maintain that although a racial imbalance does exist in the Park Hill area schools, it is justifiable under their neighborhood school policy which has been and is now operated with total neutrality regarding race. It is true that the rule of the circuit is that neighborhood school plans, when impartially maintained and administered, do not violate constitutional rights even though the result of such plans is racial imbalance. *United States* v. *Board of Education of Tulsa County* (429 F.2d 1253 (10th Cir. 1970)); *Board of Education of Oklahoma City Public Schools, Independent Dist. No. 89* v. *Dowell* (375 F.2d 158 (10th Cir. 1967)); *Downs* v. *Board of Education of Kansas City, supra.* However, when a board of education embarks on a course of conduct which is motivated by purposeful desire to perpetuate and maintain a racially segregated school, the constitutional rights of those students confined within that segregated establishment have been violated.

The evidence supports the trial court's findings regarding Barrett Elementary School. When construction of new schools in predominantly Negro neighborhoods is based on rational, neutral criteria, segregative intent will not be inferred. *Deal* v. *Cincinnati Board of Education* (369 F.2d 55 (6th Cir. 1966)); *Sealy* v. *Department of Public Instruction of Pennsylvania* (252 F.2d 898 (3d Cir. 1958)); *Craggett* v. *Board of Education of Cleveland* (234 F. Supp. 381 (N.D. Ohio 1964)); *Henry* v. *Godsell* (165 F. Supp. 87 (E.D.Mich. 1958)). Conversely, if the criteria asserted as justification for the construction and designation of attendance lines are a sham or subterfuge to foster segregation, odious intent may be inferred. Here there is sufficient evidence to support segregative intent.

The school was admittedly built in an area of increasing school population with the stated purpose of relieving overcrowded conditions at nearby schools. But the size of the school belies its intended purpose. Although Negro students transferred from nearby schools, with a large segment of Negro children formerly bussed to Park Hill being transferred to Barrett, none of the Anglos from overcrowded Stedman, eight blocks away, were transfererd to Barrett. And in point of fact, the small physical plant at Barrett did little to relieve the overcrowded conditions in nearby elementary schools since even after 1960 every adjacent elementary school continued to operate over its intended capacity. The only school which now approached its actual intended capacity was Park Hill, which was predominantly Anglo. This is an unjustifiable nonsequitur. The site upon which the building was constructed could have handled a significantly larger facility which would have had long range effects on the overcrowded conditions of the area. Instead for obsecure reasons, the building was designed to hold only 450 pupils when the adjacent elementary schools in 1959 already had an excess pupil population of 617.

Although the use of Colorado Boulevard under other circumstances could prove to be a valid exercise of board discretion, it cannot be justified under the facts here. The board admits that other elementary school attendance areas are intersected by major traffic thoroughfares, and that in at least one instance an elevated crossing was built to facilitate pupil safety. Thus it was not an immutable boundary which absolutely precluded the extension of attendance lines. On the whole, when viewing the reason asserted by the board for the construction of Barrett, in light of the actual results obtained, we cannot find clear error in the district court's finding that the size of the school and the location of its attendance boundaries reflected a purposeful intent to build and maintain a Negro school.

We are likewise compelled to support the findings of the trial court regarding the manipulation of boundaries and the use of mobile classroom units within the Park Hill area. These acts, found the trial court, "tend to isolate and concentrate Negro students in those schools which had become segregated in the wake of Negro population influx into Park Hill while maintaining for as long as possible the Anglo status of those Park Hill schools which still remained predominantly white." (313 F.Supp. at 65.)

The board's refusal to alter the Stedman attendance area in 1962 was not an affirmative act which equates with de jure segregation. The evidence reflects that the proposals would have assigned Stedman students to Smith, Hallett, and Park Hill Elementary Schools. Although the racial composition of each of these schools was predominantly Anglo in 1962, Park Hill was well over capacity, Hallett was slightly over capacity, and Smith was just under capacity. But more important, the residential areas which were to be part of the transfer contained less than 5 percent Negroes. Thus by making those alterations in attendance zones, Stedman would have lost Anglo pupils to the other schools. There can be no racial overtones attributed to the board's refusal in 1962 to make the requested Stedman transfers.

However, we have found no evidence, nor have appellants referred us to data, which rebuts or justifies the 1962 Hallett to Philips transfer. Both schools were predominantly Anglo at the time, but Hallett was in a transition stage going from 85 to 95 percent Anglo in 1962 to 41.5 percent Anglo in 1964, and to 90 percent Negro in 1969. The students which were sent to Philips were in the former Hallett—Philips optional zone and were virtually 100 percent Anglo. The trial court held that the only thing accomplished by the rezoning was the moving of Anglo students from a school district which would gradually become predominantly Negro to one which has remained predominantly Anglo. The evidence does not contradict that analysis.

The other boundary alteration that gave rise to the trial court's finding of gerrymandering of attendance zones in the Park Hill area occurred in 1964. In 1963, Hallett was 68.5 percent Anglo, Philips was approximately 98 percent Anglo; Stedman was about 19 percent Anglo, and Park Hill was over 95 percent Anglo. The first change transferred a predominantly Anglo portion out of Stedman to Hallett. Second, the Park Hill—Stedman optional zone, which was virtually all Anglo, was transferred to Park Hill. Third, a predominantly Anglo section of the Hallett district was transferred to Philips. A predominantly Anglo section of Stedman's district was sent further east to Hallett. In 1964, Hallett was reduced to 41.5 percent Anglo, Philips was roughly 82 percent Anglo; Stedman was about 15 percent Anglo, Park Hill was about 90 percent Anglo.

Although there is a sharp conflict between the parties as to whose testimony and what data should be credited, there is evidence in the record to support the trial court's determination that these were segregative acts taken with knowledge of the effect they would have. The trend is clear that as the Negro population expanded into new neighborhoods, the predominantly Anglo clusters were transferred, by the board, to one of the remaining predominantly Anglo schools. Smiley Junior High was deemed to be a segregated school because of the racial composition of its students and its faculty. In addition, it appears that Anglo students were permitted to transfer to predominantly Anglo schools even though they lived in the Smiley attendance area. The findings of the trial court, plus the additional effects of allowing Anglos to transfer out of Smiley, are supported by evidence of record and must be sustained.

At this point we pause to acknowledge that the problems facing the school board of any metropolitan city are varied and difficult. The complexities of managing a large school district such as Denver's in a manner which provides equal educational treatment for all students are manifestly made more difficult when, through circumstances often beyond their control, a single racial group settles in a particular neighborhood. Even so, the perplexities of the task cannot be used to justify abdication of constitutional responsibilities.

When a community experiences a steady and ascertainable expansion of Negro population resulting in a new and larger "Negro community", the school board must exercise extreme caution and diligence to prevent racial isolation in those schools. When new buildings are built, new classrooms added, attendance areas drawn, and teachers assigned, the board must guard against any acts which reflect anything less than absolutely neutral criteria for making the decisions. The facts as outlined above simply do not mirror the kind of impartiality imposed upon a board which adheres to a neighborhood school plan. Cf. *Downs* v. *Board of Education of Kansas City*, *supra*. In sum, there is ample evidence in the record to sustain the trial court's findings that race was made the basis for school districting with the purpose and effect of producing substantially segregated schools in the Park Hill area. This conduct clearly violates the 14th amendment and the rules we have heretofore laid down in the Downs and Dowell cases. See *Taylor* v. *Board of Education of City School District of City of New Rochelle*, (191 F.Supp. 181 (S.D.N.Y.1961)); (195 F.Supp. 231 (S.D.N.Y. 1961)); (aff'd 294 F.2d 36 (2d Cir. 1961)).

The second portion of appellants' first argument urges that the trial court erred in concluding that the act of rescinding Resolutions 1520, 1524, and 1531 was an act of de jure segregation in and of itself. It is their position that this was a valid exercise of the board's legislative powers; that there was no segregative effect; and that there were no underlying segregative motivations.

Since we have sustained the findings regarding State imposed segregation in the Park Hill area schools, it is unnecessary to further decide whether the rescission of Resolutions 1520, 1524, and 1531 was also an act of de jure segregation. It is sufficient to say that the board's adoption of those resolutions was responsive to its constitutional duty to desegregate the named schools and the trial court was within its powers in designating those resolutions as the best solution to a difficult situation. Although the alternative plan proposed in Resolution 1533 is not totally devoid of merit, a realistic appraisal of voluntary transfer plans has shown that they simply do not fulfill the constitutional mandate of dismantling segregated schools. In fact, the voluntary transfer plans previously employed in Denver have had a minimal effect on the segregated status of the Park Hill area schools. In sum, we conclude that the trial court properly refused to accept Resolution 1533 as a workable solution. Once State imposed segregation is found, trial courts are to employ their broad equitable powers to insure full and immediate desegregation. See *Brown* v. *Board of Education* (349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955)). The implementation of Resolutions 1520, 1524, and 1531 comports with that duty and holds great promise in achieving that goal. (See app. I)

Appellants' second argument relates to the older core area of the city which is populated predominantly by Negroes and Hispanos. Appellees alleged in the trial court that the schools in this area were also segregated by unlawful State action. The trial court refused this plea, and it is the subject of the cross-appeal to be discussed below. However, in addition, appellees urged that a number of these same schools were offering their students an unequal educational opportunity, thus denying them their 14th amendment right to equal protection. The contention is premised on the assertion that when compared to the other schools in the district, the core area schools were offering inferior education.

The trial court preliminarily resolved that of the 27 schools allegedly offering a sub-standard education, only those with 70 to 75 percent concentration of either Negro or Hispano students would likely produce cognizable inferiority. (313 F.Supp. at 77.) The schools so designated were:

[In percent]

School	Anglo	Negro	Hispano
Bryant-Webster [1]	23. 3	0. 5	75. 5
Columbine [1]	. 6	97. 2	2. 2
Elmwood [1]	7. 9	0	91. 6
Fairmont [1]	19. 8	0	79. 9
Fairview [1]	7. 0	8. 2	83. 2
Greenlee [1]	17. 0	9. 0	73. 0
Hallett [1]	38. 2	58. 4	2. 6
Harrington [1]	2. 2	76. 3	19. 6
Mitchell [1]	2. 2	70. 9	26. 7
Smith [1]	4. 0	91. 7	3. 3
Stedman [1]	4. 1	92. 7	2. 7
Whitties [1]	1. 4	94. 0	4. 5
Baker [2]	11. 6	6. 7	81. 4
Cole [2]	1. 4	72. 1	25. 0
Manual [3]	8. 2	60. 2	27. 5

[1] Elementary.
[2] Junior high.
[3] Senior high.

Ultimately the trial court did conclude that these designated schools were providing an education inferior to that being offered in the other Denver schools (313 F. Supp. at 97–99). The relief decreed varied as to each level, but generally provided that the 12 designated elementary schools, including Elyria and Smedley, are to be integrated with an Anglo composition in excess of 50 percent. One-half of these schools were to be desegregated and integrated by the fall of 1971, and the remainder must be desegregated and integrated by fall of 1972. Baker Junior High is to be similarly desegregated and integrated by fall of 1971. As to Cole Junior High, it could either be desegregated and integrated as are the elementary schools by fall of 1972, or it could be made the center for essential districtwide programs. Manual High is to be operated as a districtwide school for the continuation and expansion of its vocational and preprofessional programs.

Specifically, the court found:

1. That on the basis of 1968 Stanford Achievement Test results, the scholastic achievement in each of the designated schools was significantly lower than in the other schools in the district;
2. That during 1968 in the designated schools there were more teachers without prior experience, more teachers on probation (0 to 3 years of experience), and fewer teachers with 10 or more years teaching experience than in the selected Anglo schools;
3. That because of board policy which allows intrasystem teacher transfers on the basis of seniority, the more experienced teachers transferred out of predominantly minority schools at the earliest opportunity;
4. That there are more pupil dropouts in the junior high and senior high schools in the designated schools; and
5. That the size and age of the school building do not of themselves affect the educational opportunity at a given school, but smaller and older buildings may aggravate an aura of inferiority.

The second portion of the finding that the designated schools offer an unequal educational opportunity is premised on the conclusion that "segregation, regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity" (313 F. Supp. at 82).

Preliminary it is necessary to determine whether a school which is found to be constitutionally maintained as a neighborhood school might violate the 14th amendment by otherwise providing an unequal educational opportunity. The district court concluded that whereas the Constitution allows separate facilities for races when their existence is not State imposed, the 14th amendment will not tolerate inequality within those schools. Although the concept is developed through a series of analogized equal protection cases, e.g., *Griffin* v. *Illinois* (351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956)); *Douglas* v. *California* (372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963)), it would appear that this is but a restatement of what *Brown* v. *Board of Education* (347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L. Ed. 873 (1954)) said years ago:

> Such an opportunity [of education], where the State has undertaken to provide it, is a right which must be made available to all on equal terms.

For the moment we perceive no valid reason why the constitutional rights of schoolchildren would be violated by an education which is substandard when compared to other schools within that same district, provided the State has acted to cause the harm without substantial justification in terms of legitimate State interest. If we allow the consignment of minority races to separate schools, the minimum the Constitution will tolerate is that from their objectively measurable aspects, these schools must be conducted on a basis of real equality, at least until any inequalities are adequately justified. *Hobson* v. *Hansen* (269 F. Supp. 401 (D.D.C. 1967)), *modified sub nom. Smuck* v. *Hobson* (132 U.S. App. D.C. 372, 408 F. 2d 175 (1969)).

The trial court's opinion (313 F. Supp. at 81, 82, 83) leaves little doubt that the finding of unequal educational opportunity in the designated schools pivots on the conclusion that segregated schools, whatever the cause, per se produce lower achievement and an inferior educational opportunity. The quality of teachers in any school is manifestly one of the factors which affects the quality of schooling being offered. And the evidence of the case supports the finding that the teacher experience in the designated core area schools is less than that which exists in other Denver schools. However, we cannot conclude from that one factor—as indeed neither could the trial court—that inferior schooling is being offered. Pupil dropout rates and low scholastic achievement are indicative of a flaw in the system, but as indicated by appellees' experts, even a completely integrated setting does not resolve these problems if the schooling is not directed to the specialized needs of children coming from low socioeconomic and minority racial and ethnic backgrounds. Thus it is not the proffered objective indicia of inferiority which causes the substandard academic performance of these children, but a curriculum which is allegedly not tailored to their educational and social needs.

As stated in the first instance then, the trial court's findings stand or fall on the power of Federal courts to resolve educational difficulties arising from circumstances outside the ambit of State action. It was recognized that the law in this circuit is that a neighborhood school policy is constitutionally acceptable, even though it results in racially concentrated schools, provided the plan is not used as a veil to further perpetuate racial discrimination. (313 F. Supp. at 71.) In the course of explicating this rule and holding that the core area school policy was constitutionally maintained, the trial court rejected the notion that a neighborhood school system is unconstitutional if it produces segregation in fact. However, then, in the final analysis, the finding that an unequal educational opportunity exists in the designated core schools must rest squarely on the premise that Denver's neighborhood school policy is violative of the 14th amendment because it permits segregation in fact. This undermines our holdings in the *Tulsa*, *Downs* and *Dowell* cases and cannot be accepted under the existing law of this circuit.

We cannot dispute the welter of evidence offered in the instant case and recited in the opinion of other cases that segregation in fact may create an inferior educational atmosphere. Appellees observe that several of the Federal district courts across the land have indicated that because of the resulting deficiencies, the Federal courts should play a role in correcting the system. *Davis* v. *School District of City of Pontiac* (309 F. Supp. 734 (E.D. Mich. 1970)); *United States* v. *School District 151 of Cook County, Ill.*, (286 F. Supp. 786 (N.D. Ill. 1968)); *Hobson* v. *Hansen* (269 F. Supp. 401 (D.D.C. 1967)); *Blocker* v. *Board of Education of Manhasset, New York* (226 F. Supp. 208 (E.D. N.Y. 1964)); *Branche* v. *Board of Education of the Town of Hempstead* (204 F. Supp. 150 (E.D. N.Y. 1962)); and *Jackson* v. *Pasadena City School District* (59 Cal. 2d 876, 31 Cal. rptr. 606, 382 P. 2d 878 (1963)). However, the impact of such statements is diminished by indications in the *Hobson*, *Blocker*, *Branche, Cook County*, *Pontiac*, and *Jackson* cases that the racial imbalance resulted from racially motivated conduct.

Our reluctance to embark on such a course stems not from a desire to ignore a very serious educational and social ill, but from the firm conviction that we are without power to do so. *Downs* v. *Board of Education* (336 F. 2d at 998). Before the power of the Federal courts may be invoked in this kind of case, a constitutional deprivation must be shown. *Brown* v. *Board of Education* (347 U.S. 483, 493–495, 74 S. Ct. 686, 98 L. Ed. 873 (1954)) held that when a State segregates children in public schools solely on the basis of race, the 14th amendment rights of the segregated children are violated. We never construed *Brown* to prohibit racially imbalanced schools provided they are established and maintained on racially neutral criteria, and neither have other circuits considering the issue. *Deal* v. *Cincinnati Board of Education* (369 F. 2d 55 (6th Cir. 1966)); (419 F. 2d 1387 (1969)); *Springfield School Committee* v. *Barksdale* (348 F. 2d 261 (1st Cir. 1965)): *Bell* v. *School City of Gary, Ind.* (324 F. 2d 209 (7th Cir. (1963)). Unable to locate a firm foundation upon which to build a constitutional deprivation, we are compelled to abstain from enforcing the trial judge's plan to desegregate and integrate the court designated core area schools.

Although the board is no longer required by court order to correct the situation in the core area schools, we are reassured by the board's passage of resolution 1562 that the efforts made thus far will be only the beginning of a new effort to relieve the problems of those schools. In resolution 1562, the board has resolved that regardless of the final outcome of this litigation, it intends to improve the quality of education offered in the system. And it specifically directs the superintendent and his staff to devise a comprehensive plan "directed toward raising the educational achievement levels at the schools specified by the district court in its "opinion." The salutary potential of such a program cannot be minimized, and the board is to be commended for its initiative. Because of the significance of the resolution, it is set out in full in appendix II.

Appellants have also urged that mandatory busing of students from the core area schools is neither compelled by the Constitution nor allowed by the Civil Rights Act (42 U.S.C. 2000c–6(a) (2)). Although the disposition of the issue regarding the status of segregation in the core area schools obviates the necessity of deciding that issue, it is perfectly clear to us that where State imposed segregation exists, as it does in the Park Hill area, busing is one of the tools at the trial court's disposal to alleviate the condition. It cannot be gainsaid that busing is not the panacea of segregation. But, after considering all the alternatives, if the trial court determines that the benefits outweigh the detriments, it is within its power to require busing. *Swann* v. *Charlotte-Mecklenburg Board of Education* (402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971)).

The cross-appeal is first directed at the core schools which the district court refused to label as segregated by State action. At the outset, cross-appellants argue that they were required to labor under an erroneous burden of proof, and that the degree of justification for permitting racially imbalanced schools to exist was too low. The law of this circuit guides us to approve the trial court's manner of handling the contested issues.

With the knowledge that we have said that neighborhood schools may be tolerated under the Constitution, it would be incongruous to require the Denver School Board to prove the nonexistence of a secret, illicit, segregatory intent. It was indicated in the *Tulsa* case that neighborhood school plans are constitutionally suspect when attendance zones are superficially imposed upon racially defined neighborhoods, and when school construction preserves rather than eliminates the racial homogeny of given schools. *United States* v. *Board of Education of Tulsa County* (429 F. 2d at 1258–1259), But that case dealt with a school system which had previously operated under a State law requiring segregation of races in public education. As in all disestablishment cases where a former dual system attempts to dismantle its segregated schools, the burden was on the Tulsa School Board to show that they had undertaken to accomplish a unitary public school system. Such an onerous burden does not fall on school boards who have not been proved to have acted with segregatory intent. Cross-appellants' reliance on *United States* v. *School District 151 of Cook County, Ill.* (286 F. Supp. 786 (N.D.Ill. 1968)) (aff'd 404 F. 2d 1125 (7th Cir. 1968)), is misplaced for the same reasons set out above. In that case, the court was likewise dealing with a school district which was segregated by unlawful State action.

Where, as here, the system is not a dual one, and where no type of State imposed segregation has previously been established, the burden is on plaintiff to prove by a preponderance of evidence that the racial imbalance exists and that it was caused by intentional State action. Once a prima facie case is made, the defendants have the burden of going forward with the evidence. *Hobson* v. *Hansen* (269 F. Supp. at 429). They may attack the allegations of segregatory intent, causation and/or defend on the grounds of justification in terms of legitimate State interests. But the initial burden of proving unconstitutional segregation remains on plaintiffs. Once plaintiffs prove State imposed segregation, justification for such discrimination must be in terms of positive social interests which are protected or advanced. The trial court held that cross-appellants failed in their burden of proving:

(1) A racially discriminatory purpose;

(2) A causal relationship between the acts complained of and the racial imbalance admittedly existing in those schools.

The evidence in this case is voluminous, and we have attempted to carefully scrutinize it. Thorough review reflects that cross-appellants have introduced some evidence which tends to support their assertions. However, there is also evidence of record which supports the findings of the trial court, so under rule 52 F.R.Civ.P. 28 U.S.C., we must affirm. It must be remembered that we do not review this record de novo but can reverse fact findings only upon clear error. That kind of mistake is not extant here. The background of the allegedly unlawful acts and the trial court's analysis of the board's discriminatory intent and/or causation, with which we agree in each instance, follows.

The new Manual High School was constructed in 1953, just two blocks from old Manual High School. Through the years, from 1927 to 1950, Manual High had enrolled lessening numbers of Anglo students until in 1953, the school was less than 40 percent Anglo, about 35 percent Negroes, and about 25 percent Hispano. The attendance zone for new Manual was the same as it had been for Manual, opening at about 66⅔ percent capacity. Cross-appellants contend that the construction of new Manual at its present location insured its segregated character, and that this act was equivalent to State imposed segregation. The trial court refused this argument on two grounds.

1. That the decision to build new Manual on its present site was not racially motivated; and,

2. That State action was not the cause of the current racial imbalance. (131 F. Supp. at 75).

In 1956 the board adopted boundary changes which directly affected Manual High School (42 percent Negro) and Cole Junior High School (40 percent Negro). A portion of the Manual-East High optional attendance area was converted to a mandatory Manual attendance zone, and a portion of the Cole-Smiley Junior High optional attendance area was made a mandatory Cole attendance zone. The new mandatory zones were coterminous with the approximate eastern boundary of the Negro residential movement. Again the trial court held that cross-appellants had failed to establish that the boundary changes were racially motivated or that those alterations caused the current racial imbalance. (313 F. Supp. 75.)

In 1962 the Board adopted boundary changes which eliminated the optional attendance zones on three sides of Morey Junior High School. The changes involved transferring the Morey-Hill optional zone to

Hill Junior High; the Morey-Byers optional zone to Byers Junior High; the Morey-Cole optional zone to Morey Junior High; and the Baker-Morey optional zone to Morey. Morey is located on the south side of the Cole attendance area and declined from 71 percent Anglo in 1961 to 45 percent Anglo in 1962. The trial court found, however, that despite the apparent segregatory effect at Morey, the concentration of Negroes at Cole was relieved, and the facilities at Hill, Byers, and Baker Junior High Schools were better utilized. Thus, although on the surface the alterations appear to be racially inspired, there is evidence to sustain the trial court's finding that the changes were not carried out with the design and for the purpose of causing Morey to become a minority school. (313 F. Supp. at 72).

Cross-appellants have also alluded to other factors which they urge are probative of segregatory intent, i.e., faculty and staff assignments, obfuscation of minority achievement data, and double standards in dealing with overcrowding. Although minority teachers were usually located in the core area or Park Hill area schools, the board's reason for doing so was not reflective of segregative desires. It operated on the prevailing educational theory of the day, that Negro pupils related more thoroughly with Negro teachers. The rationale was that the image of a successful, well-educated Negro at the head of the class provided the best kind of motivation for Negro children and that in turn the Negro teacher had a greater understanding for the Negro pupil's educational and social problems. Although the validity of that theory is under severe attack today, we do not agree that the results of its past application infer segregatory intent. In response to new educational theories, the Denver public school system has today assigned Negro teachers to schools throughout the system and has reduced the percentages of Negro teachers in the predominantly minority schools.

We are unable to see how the evidence regarding the obfuscation of minority achievement data relates to the board's alleged segregative intent. And although cross-appellants urge that a double standard was used to deal with overcrowded conditions, the trail court's reluctance to premise segregatory intent on that basis is supported by the record. The evidence reflects that the bussing of Anglo students was caused by the city's annexation of residential areas that did not have school buildings. Hence the school children in these annexed areas were transported to the nearest school where space was available. The premise of alleging a double standard in the treatment of races is resultingly nonexistent.

The remainder of the issues designated in the cross-appeal have either been disposed of or made irrelevant by preceding parts of this opinion.

The final judgment and decree of the trail court is affirmed in all respects except that part pertaining to the core area or court designated schools, and particularly the legal determination by the court that such schools were mainained in violation of the 14th amendment because of the unequal educational opportunity afforded, this issue having been presented by the second count of the second cause of action contained in the complaint. In that respect only, the judgment is reversed. The case is accordingly remanded for the implementation of the plan in accordance with this opinion. The trail court is directed to retain jurisdiction of the case for the purpose of supervising the implementation of the plan, with full power to change, alter, or amend the plan in the interest of justice and to carry out the objective of the litigation as reflected by this opinion.

See appendixes following.

Appendix I

Racial and ethnic composition of subject schools with respect to use of resolutions 1520, 1524 and 1531

	Total number	Anglo		Negro		Hispano	
		Number	Percent	Number	Percent	Number	Percent
SENIOR HIGH SCHOOL							
If Resolution 1520 is used: [1]							
East	2, 600	1, 776	68	649	25	175	7
George Washington	2, 896	2, 528	87	333	11	35	1
South	2, 739	2, 258	82	147	5	334	12
Total	8, 235	6, 562	80	1, 129	14	544	7
If Resolution 1520 is not used: [2]							
East	2, 623	1, 409	54	1, 039	40	175	7
George Washington	2, 942	2, 823	96	84	3	35	1
South	2, 670	2, 330	87	6	0	334	13
Total	8, 235	6, 562	80	1, 129	14	544	7
JUNIOR HIGH SCHOOL							
If Resolutions 1520 and 1524 are used: [3]							
Byers	1, 241	1, 053	85	110	9	78	6
Cole	944	9	1	661	70	274	29
Grant	885	696	79	107	12	82	9
Hill	1, 303	1, 035	79	226	17	42	3
Kepner	1, 483	1, 016	69	70	5	397	27
Kunsmiller	1, 949	1, 544	79	245	13	160	8
Merrill	1, 578	1, 350	86	205	13	23	1
Rishel	1, 286	939	73	39	3	308	24
Smiley	1, 333	960	72	306	23	67	5
Thomas Jefferson	1, 637	1, 584	97	45	3	8	0
Total	13, 639	10, 186	75	2, 014	15	1, 439	11
If Resolutions 1520 and 1524 are not used: [4]							
Byers	1, 138	1, 053	93	7	1	78	7
Cole	1, 219	46	4	884	73	289	24
Grant	815	696	85	37	5	82	10
Hill	1, 753	1, 685	96	26	1	42	2
Kepner	1, 437	1, 016	71	24	2	397	28
Kunsmiller	1, 709	1, 544	90	5	0	160	9
Merrill	1, 578	1, 550	98	5	0	23	1
Rishel	1, 250	939	75	3	0	308	25
Smiley	1, 553	367	24	1, 112	72	74	5
Thomas Jefferson	1, 597	1, 584	99	5	0	8	1
Total	14, 049	10, 480	75	2, 108	15	1, 461	10

Footnotes at end of table, p. 398.

Racial and ethnic composition of subject schools with respect to use of resolutions 1520, 1524 and 1531—Continued

	Total number	Anglo		Negro		Hispano	
		Number	Percent	Number	Percent	Number	Percent
ELEMENTARY SCHOOL							
If Resolution 1531 is used:[5]							
Asbury	570	480	84	61	11	29	5
Ashley	368	444	81	60	11	44	8
Barrett	368	269	73	88	24	11	3
Carson	720	562	78	144	20	14	2
Denison	580	482	83	31	5	67	12
Force	922	744	81	86	9	92	10
Montclair and Annex	753	602	80	120	16	30	4
Moore	622	460	74	90	14	72	12
Palmer	482	390	81	72	15	19	4
Park Hill	863	682	79	112	13	69	8
Philips	584	409	70	128	22	47	8
Schenck	765	638	83	31	4	96	13
Steck	431	353	82	73	17	4	1
Stedman	566	27	5	514	91	25	4
Steele	569	424	75	103	18	42	7
Whiteman	550	429	78	99	18	22	4
Total	9, 893	7, 395	75	1, 812	18	683	7
If Resolution 1531 is not used:[6]							
Asbury	540	480	90	31	6	29	5
Ashley	550	472	86	35	6	43	8
Barrett	423	1	0	410	97	12	3
Carson	629	568	90	42	7	19	3
Denison	550	482	88	1	0	67	12
Force	862	744	86	26	3	92	11
Montclair	634	588	93	16	2	30	5
Montclair Annex	161	158	98	3	2	0	0
Moore	580	460	79	48	8	72	12
Palmer	482	442	92	24	5	16	3
Park Hill	963	684	71	223	23	56	6
Philips	555	307	55	203	37	45	8
Schenck	735	638	87	1	0	96	13
Steck	410	353	86	44	10	13	3
Stedman	686	27	4	634	92	25	4
Steele	499	424	85	33	7	42	8
Whiteman	610	537	88	49	8	24	4
Total	9, 869	7, 365	75	1, 823	18	681	7

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[1] Source: Compiled from *The Review*, official publication, Denver public schools, vol. XLX (sic), May 1969, supplemented by information supplied by school officials, *The Review*, vol. XLIX, April 1969. [Plaintiffs' exhibit 7C]

[2] Source: Compiled from *Estimated Ethnic Distribution of Pupils, Secondary Schools*—Sept. 23, 1968, Denver public schools, division of personnel services. [Plaintiffs' exhibit 7D]

[3] Source: Compiled from *The Review*, official publication, Denver public schools, vol. XLX (sic), May 1969, supplemented by information supplied by school officials, *The Review*, vol. XLIX, April 1969. [Plaintiffs' exhibit 8C]

[4] Source: Compiled from *Estimated Ethnic Distribution of Pupils, Secondary Schools*—Sept. 23, 1968, Denver public schools, division of personnel services. [Plaintiffs' exhibit 8D]

[5] Source: Compiled from *The Review*, official publication, Denver public schools, vol. XLX (sic), May 1969, supplemented by information supplied by school officials. [Plaintiffs' exhibit 9D]

[6] Source: Compiled from *Estimated Ethnic Distribution of Pupils, Elementary Schools*—Sept. 23, 1968, Denver public schools, division of personnel services. [Plaintiffs' exhibit 9E]

APPENDIX II

Whereas, this board of education, common with other boards of education in urban areas in this country, has before it the extremely difficult task of providing relevant and effective education to children of infinitely varied backgrounds and abilities; and

Whereas, this board of education is concerned about all the children of Denver and is constantly searching for ways and means to improve the quality of education offered to them; and

Whereas, this board of education has, as an interim measure, adopted various plans and approaches toward the improvement of the quality of education offered to the children of Denver, including voluntary open enrollment with transportation provided; and

Whereas, the intervention of a lawsuit in the U.S. district court has prevented this interim measure from achieving its full potential; and

Whereas, that court in its Memorandum Opinion dated March 21, 1970, has found that certain schools of this school district show average pupil achievement below the citywide average achievement of pupils; and

Whereas, this board is, and has been, aware of these differences in average pupil achievement among the various schools and has been attempting to set educational policy which will permit the professional staff of this school district to devise and employ new methods of education designed to improve achievement in all schools including those with low achievement averages, by such means as early childhood education, intensified reading programs, cultural arts centers, outdoor education centers, school clusters or complexes, inservice education, modification and expansion of curricular offerings, and other promising ideas; and

Whereas the U.S. district court now has invited this board to devise and present to it a plan designed to improve the achievement of pupils in certain of its schools now, therefore, it is

Resolved By this board of education that, regardless of the final outcome of the litigation, this board reaffirms its intent to continue improvement in the quality of education offered to all of the children of Denver, and it hereby directs the superintendent and his staff to devise a plan directed toward raising the educational achievement levels at the schools specified by the district court in its opinion. This plan shall be a pilot program which shall include consideration of the following:

1. Differentiated staffing;
2. Increasing the level of faculty experience and decreasing faculty turnover;
3. Increased and improved inservice training for staff;
4. Voluntary open enrollment as opposed to mandatory transfers for pupils;
5. The school complex concept which will focus on decentralized decisionmaking, community, and parent involvement, new educational programs, and agency cooperation;
6. Early childhood education;
7. Special programs now being implemented at Cole Junior High School and Manual High School;
8. Special programs available under the Educational Achievement Act of Colorado (Senate bill 174);
9. Other promising educational innovations.

The plan shall be feasible and within the financial ability of the district, and include a timetable for implementation.

Such a plan shall be submitted to the board on or before May 6, 1970.

The overall racial and ethnic composition of Denver Public Schools as of 1968–69 [1]

Educational level	Total students	Percent		
		Anglo	Negro	Hispano
Elementary	54, 576	61. 7	15. 2	22. 0
Junior high	18, 576	64. 0	15. 5	17. 0
Senior high	23, 425	76. 1	10. 4	9. 0
Total	96, 577	70. 7	12. 7	15. 8

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[1] **Report and Recommendations to the Board of Education School District Number One Denver, Colorado, by a Special Study on Equality of Educational Opportunity in the Denver Public Schools (March 1, 1964), pp. A–1 to A–6.**

School	Capacity		Enrollment		Percent of capacity	
	1959	1960	1959	1960	1959	1960
Columbine	780	780	901	884	116	113
Harrington	450	450	690	546	153	121
Park Hill	660	630	859	650	130	103
Stedman	630	630	687	698	109	111
Barrett		450		507		113

APPENDIX A

COMPARISON OF RICHMOND PUBLIC SCHOOLS K–12 MEMBERSHIP PROJECTIONS UNDER PLAN III, 1971–72, WITH ACTUAL K–12 MEMBERSHIP ON SELECTED DATES DURING THE 1ST MONTH OF SCHOOL

Description	Black		White		Total
	Number	Percent	Number	Percent	
Revised projections	30, 155	63	17, 462	37	47, 617
Membership:					
Aug. 30, 1971	26, 517	68	12, 394	32	38, 911
Sept. 1, 1971	28, 365	69	12, 986	31	41, 351
Sept. 7, 1971	29, 163	69	13, 260	31	42, 423
Sept. 13, 1971	29, 545	69	13, 482	31	43, 027
Sept. 24, 1971	29, 747	69	13, 500	31	43, 247
Revised projections minus Sept. 24, 1971, membership; i.e., loss	408	--	3, 962	--	4, 370
Loss expressed as percent of revised projections	1. 4	--	22. 7	--	9. 2

COMPARISON OF RACIAL MIX

(As of Sept. 25, 1970)

Name of school	Freedom of choice plan, 1969-70, percent		School board plan, 1970-71			
			Projected percent		Actual percent	
	Black	White	Black	White	Black	White
High schools:						
Armstrong	100. 0	0. 0	59. 0	41. 0	75. 0	25. 0
Huguenot	. 75	99. 26	29. 0	71. 0	20. 0	80. 0
Thomas Jefferson	8. 0	92. 0	59. 0	41. 0	43. 0	57. 0
John F. Kennedy	100. 0	0. 0	71. 0	29. 0	93. 0	7. 0
John Marshall	68. 0	32. 0	67. 0	33. 0	73. 0	27. 0
Maggie Walker	100. 0	0. 0	61. 0	39. 0	79. 0	21. 0
George Wythe	19. 0	81. 0	47. 0	53. 0	44. 0	56. 0
Middle schools:						
Bainbridge	31. 0	69. 0	51. 0	49. 0	56. 0	44. 0
Binford	73. 0	27. 0	(1)	(1)	(1)	(1)
Chandler	88. 0	12. 0	[2] 67. 0	[2] 23. 0	[3] 77. 0	[3] 23. 0
East End	100. 0	0. 0	57. 0	43. 0	68. 0	32. 0
Elkhardt	3. 0	97. 0	21. 0	79. 0	27. 0	73. 0
Graves	100. 0	0. 0	70. 0	30. 0	74. 0	26. 0
Albert Hill	9. 0	91. 0	71. 0	29. 0	72. 0	28. 0
Mosby	99. 92	. 08	85. 0	15. 0	95. 0	5. 0
Thompson	2. 0	98. 0	35. 0	65. 0	42. 0	58. 0
Elementary schools:						
Amelia	100. 0	0. 0	69. 0	31. 0	68. 0	32. 0
Arents	8. 0	92. 0	(4)	(4)	(4)	(4)
Bacon	99. 86	. 14	(5)	(5)	(5)	(5)
Baker	99. 90	. 10	91. 0	9. 0	99. 59	. 41
Bellemeade	. 31	99. 69	23. 0	77. 0	31. 0	69. 0
Bellevue	100. 0	0. 0	100. 0	0. 0	98. 88	1. 12
Blackwell	[6] 100. 0	[6] 0. 0	75. 0	25. 0	79. 0	21. 0

See footnotes at end of table., p. 403

COMPARISON OF RACIAL MIX—Continued

Name of school	Freedom of choice plan, 1969-70, percent		School board plan, 1970-71			
			Projected percent		Actual percent	
	Black	White	Black	White	Black	White
Elementary Schools—Continued						
Bowler	100. 0	0. 0	100. 0	0. 0	100. 0	0. 0
Broad Rock	2. 0	98. 0	. 17	99. 83	4. 0	96. 0
Carver	100. 0	0. 0	97. 0	3. 0	100. 0	0. 0
Chimborazo	99. 88	. 12	98. 0	2. 0	99. 66	. 34
Clark Springs	99. 29	. 71	60. 0	40. 0	68. 0	32. 0
Webster Davis	100. 0	0. 0	(7)	(7)	(7)	(7)
Fairfield Court	100. 0	0. 0	100. 0	0. 0	99. 44	. 56
Fairmount	100. 0	0. 0	98. 0	2. 0	100. 0	0. 0
Fisher	0. 0	100. 0	0. 0	100. 0	. 20	99. 80
William Fox	10. 0	90. 0	76. 0	24. 0	70. 0	30. 0
Francis	2. 0	98. 0	0. 0	100. 0	2. 0	98. 0
Franklin	100. 0	0. 0	57. 0	43. 0	55. 0	45. 0
Fulton	6. 0	94. 0	66. 0	34. 0	53. 0	47. 0
Ginter Park-Brook Hill	30. 0	70. 0	51. 0	49. 0	47. 0	53. 0
Greene	8. 0	92. 0	6. 0	94. 0	7. 0	93. 0
Patrick Henry	7. 0	93. 0	(8)	(8)	(8)	(8)
Highland Park	78. 0	22. 0	55. 0	45. 0	90. 0	10. 0
Robert E. Lee	9. 0	91. 0	(9)	(9)	(9)	(9)
Mason	100. 0	0. 0	100. 0	0. 0	100. 0	0. 0
Maury	37. 0	63. 0	(10)	(10)	(10)	(10)
Maymont	100. 0	0. 0	(11)	(11)	(11)	(11)
Munford	3. 0	97. 0	14. 0	86. 0	18. 0	82. 0

Norrell and annex	100.0	0.0	97.0	3.0	99.47	.53
Oak Grove and annex	47.0	53.0	(12)	(12)	(12)	(12)
Redd	0.0	100.0	0.0	100.0	.19	99.8
Mary Scott	100.0	0.0	(13)	(13)	(13)	(13)
Southampton	5.0	95.0	8.0	92.0	7.0	93.0
Stuart	100.0	0.0	100.0	0.0	91.0	9.0
Summer Hill-Ruffin Road	12.0	88.0	19.0	81.0	14.0	86.0
West End	100.0	0.0	(14)	(14)	(14)	(14)
Westhampton	14.0	86.0	21.0	79.0	22.0	78.0
Westover Hills	.55	99.45	35.0	65.0	29.0	71.0
Whitcomb Court	100.0	0.0	96.0	4.0	99.75	.25
Woodville	100.0	0.0	100.0	0.0	99.52	.48
Special programs:						
Bowser	66.0	34.0	66.0	34.0	76.0	24.0
Cary	60.0	40.0	49.0	51.0	52.0	48.0
Churchill Opportunity Center	92.0	8.0	(5)	(5)	(5)	(5)
Community Training Center	100.0	0.0				
Cooperative Training Center	22.0	78.0	22.0	78.0	38.0	62.0
Stonewall Jackson	47.0	53.0	47.0	53.0	33.0	67.0
Memorial Foundation	38.0	62.0	38.0	62.0	26.0	74.0
Randolph						
Richmond Cerebral Palsy Center	18.0	82.0	18.0	82.0	21.0	79.0
Richmond Technical Center	(15)	(15)	(15)	(15)	(15)	(15)
Richmond Trades Training Center	83.0	17.0	83.0	17.0	90.0	10.0
Sidney	100.0	0.0	(16)	(16)	(16)	(16)
Hickory Hill	10.0	90.0	71.0	29.0	40.0	60.0
Thirteen Acres	0.0	100.0	0.0	100.0	6.0	94.0

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[1] Paired with Hill.

[2] Projected percents for Chandler included the pupils expected to attend Northside Middle School.

[3] Actual percents for Chandler included the pupils who attended Northside Middle School.

[4] Special learning center.

[5] Part of East End Cluster.

[6] Elementary and junior.

[7] Paired with Fulton.

[8] Paired with Franklin.

[9] Paired with Amelia.

[10] Part of Bainbridge.

[11] Paired with Thompson.

[12] Paired with Bellemeade.

[13] Paired with Ginter Park-Brook Hill.

[14] Paired with Fox.

[15] Students accounted for in high schools.

[16] Closed Oct. 2, 1970.

CHESTERFIELD COUNTY

	1966-67				1967-68				1968-69				1969-70				1970-71			
	Pupils		Faculty		Pupils		Faculty		Pupils		Faculty		Pupils		Faculty		Pupils		Faculty	
	B	W	B	W	B	W	B	W	B	W	B	W	B	W	B	W	B	W	B	W
HIGH SCHOOLS																				
Carver	255	0	33	1	264	0	33	2	245	0	26	1	210	0	27	2				
Grange Hall	12	54	0	11	11	54	0	10	4	60	1	15	8	51	0	7	15	63	1	17
Huguenot	12	1,397	0	82	11	1,582	1	82	9	1,240	0	73	10	1,341	1	79	(1)	(1)	(1)	(1)
Manchester	25	1,177	1	63	18	1,275	1	68	24	867	1	11	37	1,087	1	62	62	1,139	4	62
Matoaca	73	159	0	32	81	161	1	28	94	164	4	36	114	179	6	44	167	198	8	49
Meadowbrook	8	818	0	46	15	875	0	48	13	942	1	49	13	994	1	57	30	1,062	3	60
Midlothian	8	245	0	38	11	283	0	47	19	371	1	48	17	517	0	58	41	637	4	63
Thomas Dale	25	1,109	0	63	29	1,247	1	70	23	862	2	75	42	913	2	85	147	1,035	4	62
MIDDLE SCHOOLS																				
Carver Annex [2]	240	0	33	1	219	0	33	2	186	0	26	1	71	0	27	2	41	443	3	25
Chester Int.	26	789	0	35	38	864	0	37	77	874	4	39	91	928	2	54	127	928	4	47
Elkhardt Int.	18	715	0	35	22	715	1	36	29	723	1	38	22	753	0	31	(1)	(1)	(1)	(1)
Falling Creek Int.	10	1,025	0	47	12	1,165	1	50	23	1,211	1	55	39	1,289	2	45	39	1,305	3	69
Grange Hall	7	85	0	11	10	90	0	10	26	73	1	15	35	78	1	7	49	81	1	17

Matoaca	97	259	0	32	123	274	1	28	168	271	4	36	197	269	6	44	212	301	8	49
Midlothian	23	505	0	38	24	614	0	47	46	521	1	48	54	506	0	58	53	664	0	10
Providence									23	971	2	46	28	1, 168	3	59	31	1, 271	3	41
Thomas Dale									23	477	2	75	29	467	2	85				
Thompson Int.	20	1, 116	0	49	14	1, 121	0	55	13	1, 252	1	58	24	1, 285	1	63	(1)	(1)	(1)	(1)
	*				*				*				*				*			

HENRICO COUNTY SCHOOLS

Douglas Freeman	10	1, 448	0	74	10	1, 523	0	86	6	1, 654	1	89	17	1, 768	1	95	14	1, 915	0	103
Henrico	13	1, 621	0	84	12	1, 595	0	84	18	1, 653	0	88	45	1, 657	2	90	68	1, 659	1	104
Hermitage	10	1, 330	0	71	20	1, 350	0	76	29	1, 397	0	78	103	1, 509	6	84	96	1, 510	4	86
Highland Springs	18	1, 077	0	65	25	1, 081	0	66	57	1, 099	1	65	164	1, 124	2	75	180	1, 178	2	78
J. R. Tucker	20	1, 903	0	96	21	2, 009	0	103	25	2, 091	0	110	57	2, 148	3	114	53	2, 180	4	112
Varina	114	913	0	57	115	958	0	63	135	977	0	69	196	997	2	72	203	1, 076	3	71
Virginia Randolph	479	0	35	0	566	0	39	1	476	0	39	1								
MIDDLE SCHOOLS																				
Brookland	10	1, 586	0	74	16	1, 623	0	78	39	1, 720	0	81	140	1, 530	5	83	159	1, 619	4	82
Fairfield Jr	73	1, 523	0	71	89	1, 411	0	75	172	1, 452	0	75	294	1, 500	3	82	288	1, 300	7	77
Tuckahoe Jr	12	1, 701	0	80	10	1, 528	0	80	16	1, 540	0	72	27	1, 534	4	86	23	1, 621	5	81

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[1] Richmond school.

[2] Prior to 1970-71 was Carver.

RICHMOND CITY

	1969-70				1970-71 pupils (percent)				1970-71, faculty		1971-72 pupils (percent)			
	Pupils (percent)		Faculty		Projected		Actual				Projected		Actual	
	B	W	B	W	B	W	B	W	B	W	B	W	B	W
HIGH SCHOOLS														
Armstrong	100	0	85	6	59	41	75	25	45	38	70	30	72	28
Huguenot	.74	99.26	1	79	29	71	20	80	40	47	43	57	43	57
Jefferson	8	92	4	87	59	41	43	57	38	48	59	41	57	43
Kennedy	100	0	73	15	71	29	93	7	48	47	75	25	88	12
Marshall	68	32	9	66	67	33	73	27	38	39	79	21	78	22
Walker	100	0	75	6	61	39	79	21	39	40	74	26	77	23
Wythe	19	81	6	86	47	53	44	56	42	43	57	43	57	43

Note: Includes entire staff.

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APPENDIX B

Portion of PX-144-I

EFFECT OF STATE LAWS AND STEPS TO BE TAKEN SHOULD A SCHOOL BE INTEGRATED

This memorandum is primarily concerned with chapter 9.1 of title 22 of the Code of Virginia, "Operation of Schools by State." This chapter has two articles, each of which is independent of the other.

Section 22–188.5 provides that the making of an assignment and enrolling of a child in a school, either voluntarily or under court order, which would result in integration shall (1) automatically divest the local school authorities of all authority, power, and control over such school. (2) The school is closed and is removed from the public school system. (3) All authority, power, and control over the school, its principal, teachers, other employees, and all pupils enrolled or ordered to be enrolled is vested in the Commonwealth to be exercised by the Governor.

Section 22–188.6 provides that when the school is automatically closed it shall not be reopened as a public school until in the opinion of the Governor, and after investigation by him, he finds and issues an Executive order that (1) the reopening of the school will not disturb the peace and tranquility of the community, and (2) the assignment of pupils to the school could be accomplished without enforced or compulsory integration of the races, contrary to the wishes of any child enrolled therein or of his or her parents.

Section 22–188.7 provides that if after investigation the Governor concludes that the school cannot be reopened under the two conditions listed above, he has the authority . . . such other changes as in his discretion may be necessary and desirable and needed to effect a reopening of the school. He may reassign the pupils to any other public schools in the locality, including the school in which a pupil was formerly enrolled if he deems it necessary to preserve order. The Governor shall give due consideration to the laws of the Commonwealth and the safety and welfare of the child in assigning and enrolling pupils.

Section 22–188.8 provides that if the school still cannot be reorganized and reopened, he can assign the pupils to other schools in the locality, and the Governor is authorized to make other facilities for the instruction of the children available, and to reassign teachers from the closed school.

Section 22–188.9 provides that if a school is closed and any of the pupils cannot be reassigned to another public school, then the Governor and the local authorities are authorized to make tuition grants available for the child to attend a private school.

Section 22–188.10 authorizes the Governor to supplement the appropriation made available to a political subdivision if necessary to carry out the provisions of this article with respect to assigning pupils to other schools.

Section 22–188.11 provides that whenever it is made to appear to the Governor that any school which has been closed can be reopened and operated with the public peace being maintained and not compulsory or enforced integration, he is authorized to return the operation and control of the school to the local authorities.

Section 22–138.12 provides that notwithstanding any other provision to the contrary, any time the Governor concludes, or the school board, or board of supervisors, or city council certifies by resolution, that the school cannot be reopened, or reorganized and reopened in conformity with the provisions of the law, the Governor shall so proclaim and the school shall be returned to the locality, become a part of the public school system, and become subject to the laws of the State, including the provisions of the Appropriation Act.

The Governor, by section 22–188.13, is granted all necessary powers to carry out the provisions of the article. The State assumes the contractual obligations of the local school board with the principal, teachers, and employees of the school closed and, upon authorization of the Governor, they are to be paid by the State.

I am of the opinion that when the school is closed and taken out of the school system, this leaves the rest of the system of a particular locality free to continue to operate and to receive State funds. It is only when the Governor concludes, or the local school board or council certifies, that the school cannot be reopened in conformity with the provisions of law and the school is returned to the locality and to the public school system that the fund cutoff provision is applicable, and it is only applicable if the school is integrated.

Whenever article I, of chapter 9.1, comes into operation, it is obvious that the Governor cannot always personally take charge of the school property.

It is my suggestion that, whenever it is probable that the Governor will be required to assume control of any school due to it having become integrated, he explore the possibility of having the division superintendent of schools, or some other school official, represent him. If this is not deemed wise and feasible, the Governor can consider the advisability of alerting the superintendent of State police to the possibility of the school's being closed and have available at the school a sufficient number of State police. Immediately upon enrollment of a Negro child, the representative of the Governor (either the division superintendent or some other school official, or the superintendent of State police) shall assemble the student body and the faculty and read to them a statement prepared by the Governor. This statement would apprise the faculty and the student body that—by virtue of the powers vested in him by the general assembly—the Governor is assuming control of the school in question and directs the student body and the faculty to leave the school property, subject to further orders of the Governor. The Governor will then be in a position to determine whether or not it is necessary, in order to protect the property and to prevent any incidents, to maintain a contingent of police at the premises during the time the school is closed and he is attempting to have it reorganized and restored to the school system.

JOHNSON *v.* SAN FRANCISCO UNIFIED SCHOOL DISTRICT

C–70 1331 SAW (N.D. Cal. 1971)

ORDER SETTING ASIDE SUBMISSION

On June 24, 1970, plaintiffs filed suit against the San Francisco Unified School District to enjoin racial discrimination claimed to exist in the public elementary schools. The complaint charges, among other things, discrimination against blacks in the following respects: Allocating resources, services, and facilities to various schools; hiring teachers; assigning teachers and administrators; drawing lines for attendance zones with an intent to foster segregation; building new schools, classrooms, and additions to old schools so as to perpetuate segregation; and knowingly and intentionally instituting programs which are unnecessarily discriminatory in effect.

Plaintiffs ask for injunctive relief ordering immediate and complete desegregation of student bodies, faculties and administrative personnel in the public elementary schools of San Francisco and ordering defendants to provide equal educational opportunities for all schoolchildren in those schools.

Defendants have denied these charges.[1]

On August 25, 1970, the parties in open court agreed that this case was ready for submission for final judgment. In permitting submission, the court announced that it would not hestitate thereafter to set aside the submission or to take any different action which would serve the ends of justice.

From what has been presented by the parties, it is clear that they agree that the Constitution of the United States guarantees children the right to equal educational opportunity. They agree, too, that providing equal educational opportunity demands solution of complex problems which vitally affect students, parents, teachers, school administrators and the community as a whole.[2] While the parties disagree as to what means the law requires for provision of equal educational opportunity, it is clear that the following are some of the relevant questions which, sooner or later, must be answered.

1. Is approximate racial balance required in all schools?
2. Is busing required when it is the only practical means of correcting racial imbalance?
3. Can neighborhood attendance zones be preserved?

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[1] While defendants do not deny that the San Francisco elementary schools are racially imbalanced, they do deny that the imbalance results from any fault or neglect on their part.

[2] Defendants have commendably undertaken a significant experiment—the Richmond complex—in the interest of finding ways to solve these problems.

4. Must new school construction be geared to promote racial balance?
5. Must teachers be hired on a basis of creating or promoting racial balance in their ranks?
6. Must teachers be assigned so that the teaching staff of each school is racially balanced?
7. Must school facilities be so equalized that innovations are required to be simultaneously introduced in all schools?
8. Do "tracking" systems deny equal educational opportunity?
9. Can the constitutional requirements for equal educational opportunity be met notwithstanding "de facto" segregation?

While many courts throughout the country have dealt with these questions in decisions which reflect a wide variety of legal interpretation, none has been finally resolved by decision of the Supreme Court of the United States. However, it now appears that that will change relatively soon. The Supreme Court ordered argument to be heard on October 12, 1970, in six cases which present the following questions for decision.

> May a State constitutionally ban the busing of students?[3]
>
> Does judicial prescription of racial balance in schools violate the 1964 Civil Rights Act?[4]
>
> Does a county attendance plan for elementary schools unconstitutionally discriminate by permitting some students to attend schools near their residences while requiring others to attend more distant schools?[5]
>
> Are black students denied equal protection by continued assignment to segregated black schools despite the existence of a feasible alternative plan of assignment which would result in complete desegregation?[6]
>
> May a State court prohibit school authorities from requiring any student to attend a particular school because of his race?[7]

Since the Supreme Court has provided for such early hearing of the cases presenting the foregoing questions and since this augurs decisions well before the start of the next school year in the San Francisco elementary schools, it would be less than wise or just for this court now to act on the basis of its assumptions as to what the Supreme Court will shortly decide. Such action at this time might result in issuance of injunctive orders calling for costly and complicated dislocation, in midterm, of the current operation of the San Francisco elementary schools. Moreover, what this court might now order could turn out to be at variance with requirements which may be laid down by the U.S. Supreme Court. In other words, what this court might presently order could be less than the Supreme Court may shortly decide to be required or, for that matter, more.

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[3] Moore v. Charlotte-Mecklenburg Bd. of Educ., *appeal docketed*, 39 U.S.L.W. 3079 (July 23, 1970) (No. 444); North Carolina State Bd. of Educ. v. Swann, *appeal docketed*, 39 U.S.L.W. 3067 (August 4, 1970) (No. 498). The disposition of these cases is especially relevant to the instant case in light of the recent California statute Assembly Bill No. 551, as amended in Assembly, April 30, 1970 (adding § 1009.5 to the *Calif. Educ. Code*), providing that: "No governing board of a school district shall require any student or pupil to be transported for any reason without written permission of the parent or guardian."

[4] Charlotte-Mecklenburg Bd. of Educ. v. Swann, *petition for cert. filed*, 39 U.S.L.W. 3052 (July 2, 1970) (No. 349); McDaniel v. Barresi, *petition for cert. filed*, 39 U.S.L.W. 3079 (July 20, 1970) (No. 420).

[5] McDaniel v. Barresi, *petition for cert. filed*, 39 U.S.L.W. 3079 (July 20, 1970) (No. 420).

[6] Davis v. Mobile Co. Bd. of School Commissioners, *petition for cert. filed*, 39 U.S.L.W. 3079 (July 23, 1970) (No. 436).

[7] Moore v. Charlotte-Mecklenburg Bd. of Educ., *appeal docketed*, 39 U.S.L.W. 3079 (July 23, 1970) (No. 444).

Under these circumstances, commonsense and good law unite in impelling this court to await the determinations of the Supreme Court which will be binding upon it. And that time, this court should be able to act with greater certitude and, therefore, with greater fairness to all concerned.

This decision to postpone judgment should not be misinterpreted. Defendants should prepare themselves to be ready promptly to meet whatever requirements may be delineated by the Supreme Court of the United States. Once the Sureme Court has laid down the law, no person or agency bound by that law, nor any court, can be permitted delay in conforming to the legal requirements.

It would appear, therefore, that defendants would do well promptly to develop plans calculated to meet the different contingencies which can reasonably be forecast. If, for example, the board of education works out details for maximum changes based upon the assumption that the Supreme Court will require them, the board will then be able to act effectively, in case of need, without causing confusion and with a minimum of unnecessary dislocation. Should the decisions of the Supreme Court not require such substantial changes, the board and those connected with it will at least have made what ought to be productive studies of various means for promoting equality of educational opportunity.

For all of the foregoing reasons, the order of submission heretofore made is hereby set aside. The court retains jurisdiction to take such further action at any time as it may deem necessary to provide for compliance with the Constitution and laws of the United States.

STANLEY A. WEIGEL,
Judge.

DATED: SEPTEMBER 22, 1970.

MEMORANDUM AND ORDER

REQUIRING THE PARTIES TO FILE PLANS FOR SCHOOL DESEGREGATON

Seven months ago, on September 22, 1970, this court decided that justice in this case would best be served by postponing definitive action until after the Supreme Court of the United States decided six cases then pending before it. Last week, the six decisions were handed down.[1] Each decision was unanimous.

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[1] Swann v. Charlotte-Mecklenburg Bd. of Educ., 39 U.S.L.W. 4437 (U.S. April 20. 1971); Charlotte-Mecklenburg Bd. of Educ. v. Swann, 39 U.S.L.W. 4437 (U.S. April 20, 1971); Davis v. Board of School Commissioners, 39 U.S.L.W. 4447 (U.S. April 20, 1971); North Carolina State Bd. of Educ. v. Swann, 39 U.S.L.W. 4449 (U.S. April 20, 1971); McDaniel v. Barresi, 39 U.S.L.W. 4450 (U.S. April 20, 1971); Moore v. Charlotte-Mecklenburg Bd. of Educ., 39 U.S.L.W. 4451 (U.S. April 20, 1971).

While the six decisions did relate to Southern States in which there had at one time been "racially separate public schools established and maintained by state action" [*Swann* versus *Charlotte-Mecklenburg Board of Education*, 39 U.S.L.W. 4437, 4438 (U.S. April 20, 1971)], neither the logic nor the force of the rulings is limited by any North-South boundary line.

For the past 17 years, every Supreme Court decision on the subject has consistently struck down racial segregation in public schools resulting from laws which either directly or indirectly required or contributed to such segregation.[2] Last week's decisions fortify—do not water down—the prior holdings. And the Supreme Court has never condoned any double standard of constitutional compliance based upon geography.

While it was not clear 7 months ago, it is clear today that to correct unlawful racial segregation in public schools:

1. Busing can be required and State law may not prohibit it.
2. Racial balance or quotas may be judicially imposed.
3. Some students may be permitted to attend schools near their homes; others may be required to attend distant schools.
4. Any student may be required to attend a particular school because of his race.
5. U.S. district courts have exceptionally broad equity powers to shape decrees to meet the complex problems of protecting the constitutional right to equality of educational opportunity.

It is now clear, too, under last week's Supreme Court decisions, that the San Francisco Board of Education possesses powers broad enough to correct the unlawful segregation which still persists in the San Francisco elementary schools.[3] And, of course, to repeat for

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[2] *See, e.g.*, Green v. County School Board, 391 U.S. 430 (1968) and Raney v. Board of Education, 391 U.S. 443 (1968) (holding "freedom of choice" plans unconstitutional); Griffin v. County School Board, 377 U.S. 218 (1964) (holding unconstitutional the closing of all the schools in one county); Goss v. Board of Education, 373 U.S. 683 (1963) (holding unconstitutional a free transfer provision by which students were allowed to transfer, solely on a racial basis, from the school to which they had been assigned by virtue of redistricting if they were in a racial minority in their new school).

[3] FINDINGS OF FACT AND CONCLUSIONS OF LAW. The Court, having considered the voluminous evidence presented by the parties, hereby finds:

1. That public elementary schools in the San Francisco Unified School District are racially segregated.
2. That while only 28.7% of all the children enroled in the elementary schools are black, 80% of the black children are concentrated in twenty-seven schools out of a total of more than one hundred. The student bodies of these 27 schools range from 47.3% black to 96.8% black. In only two of them are black children even slightly in the minority and in only four are the student bodies less than 72% black. (Plaintiffs' Exhibits 1 and 2.)
3. That acts and omissions of the San Francisco Board of Education are proximate causes of the racial segregation.
4. That such acts include:
    a. Construction of new schools and additions to old schools in a manner which perpetuated and exacerbated existing racial imbalance. (Exhibit "B", Plaintiffs' Reply Brief in Support of Motion for Preliminary Injunction, July 27, 1970; Deposition of William L. Cobb, Ph.D., of July 14, 1970, pages 78–80; Deposition of Laurel E. Glass, Ph.D., of July 20, 1970, pages 22–59.)
    b. Drawing attendance zones so that racial mixture has been minimized; modification and adjustment of attendance zones so that racial separation is maintained. (Deposition of Laurel E. Glass, Ph.D.,

emphasis, it is now clear that the court has both the power and the duty to do so if the school authorities fail or refuse.

This situation was anticipated by this court some 7 months ago when it stated:

> This decision to postpone judgment should not be misinterpreted. Defendants should prepare themselves to be ready promptly to meet whatever requirements may be delineated by the Supreme Court of the United States. Once the Supreme Court has laid down the law, no person or agency bound by that law, nor any court, can be permitted delay in conforming to the legal requirements.
>
> It would appear, therefore, that defendants would do well promptly to develop plans calculated to meet the different contingencies which can reasonably be forecast. If, for example, the board of education works out details for maximum changes based upon the assumption that the Supreme Court will require them, the board will then be able to act effectively, in case of need, without causing confusion and with a minimum of unnecessary dislocation. Should the de-

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supra, pages 19–28; Deposition of William L. Cobb, Ph.D., *supra*, pages 51–57; Plaintiffs' Exhibits 1–8.)

c. Allocating a highly disproportionate number of inexperienced and less qualified teachers to schools with student bodies composed predominantly of black children. (Deposition of Laurel E. Glass, Ph.D., *supra*, pages 48–50; Affidavit of Maureen O'Sullivan, July 17, 1970.)

5. That such omissions include:

a. Failure to accept suggestions offered by school officials regarding the placement of new schools so as to minimize segregation. (Deposition of William L. Cobb, Ph.D., *supra*, pages 78–96.)

b. Failure to adopt a policy of consulting with the Director of Human Relations of the School District as to the predictable racial composition of new schools. (Deposition of William L. Cobb, Ph.D., *supra*, page 76.)

c. Prolonged failure to pursue a policy of hiring teachers and administrators of minority races. (Plaintiffs' Exhibit 14.)

d. Failure to take steps to bring the racial balances in elementary schools within the guidelines set by the State Board of Education. (Plaintiffs' Exhibit 1; Plaintiffs' Exhibit 21–B, page 25; Deposition of William L. Cobb, Ph.D., *supra*, pages 67–106.)

e. Failure to adopt sufficient measures to improve the education of children in predominantly black schools despite the Board's knowledge that education in these schools was inferior to that provided in predominantly white schools. (Deposition of Isadore Pivnick, of July 14, 1970, pages 14–19; Deposition of Laurel E. Glass, Ph.D., *supra*, page 16; Affidavit of Maureen O'Sullivan, July 17, 1970.)

f. Failure to respond to recommendations regarding integration made at the Board's requests by the Stanford Research Institute and by the Report of the Citizens' Advisory Committee to the Superintendent's Task Force Studying Educational Equality/Quality and Other Proposals. (Plaintiffs' Exhibits 26 and 32.)

Having found these facts, the Court concludes that segregation which exists in San Francisco's public elementary schools results from state action and is unconstitutional under Brown v. Board of Education, 347 U.S. 483 (1954), as well as under later decisions of the Supreme Court of the United States. Because time is of the essence in vindicating the right of elementary school children in San Francisco to equal educational opportunity, the Court now enters only preliminary findings and conclusions in support of the order today made. The citations to the record by no means exhaust the substantiating evidence before the Court. More extensive findings of fact and conclusions of law will be filed as occasion may arise.

> cisions of the Supreme Court not require such substantial changes, the board and those connected with it will at least have made what ought to be productive studies of various means for promoting equality of educational opportunity.

In the light of all of the foregoing, the court hereby orders defendants to file, on or before June 10, 1971, a comprehensive plan for the desegregation of all San Francisco public elementary schools to go into effect at the start of the school term in the fall of this year. The court hereby also orders the plaintiffs to file such a plan on or before that date for the assistance of the Court in the event the court should find defendants' plan inadequate or otherwise deficient.[4]

If defendants have paid heed to the strong suggestion of this court, in its order of September 22, 1970, they will have had, by June 10, 1971, almost 9 months for development of their plan. Since the time for plaintiffs' is less than 2 months, the court suggests that plaintiffs at once undertake to enlist the assistance of one or more highly qualified experts to develop their plan.

For the general guidance of both plaintiffs and defendants, the court directs the parties to perfect their plans not only in the light of all relevant decisions of the U.S. Supreme Court but particularly in the light of the remedies approved in *Swann, supra*, and its companion cases. The court also deems it appropriate to suggest that each plan should be carefully prepared in detail to insure accomplishment of at least the following objectives by the start of the 1971 fall school term.

> 1. Full integration of all public elementry schools so that the ratio of black children to white children will then be and thereafter continue to be substantially the same in each school. To accomplish this objective, the plans may include provision for:
>
> > (*a*) Use of nondiscriminatory busing if, as appears now to be clear, at least some busing will be necessary for compliance with the law.
> >
> > (*b*) Changing attendance zones whenever and wherever necessary to eliminate or head off racial segregation.
>
> 2. Assurance that school construction programs will not promote racial segregation whether by enlargement of existing facilities or location of new ones or otherwise.
>
> 3. Establishment of practices for the hiring of teachers and administrators which will effectively promote racial balance in the respective staffs.
>
> 4. Establishment of practices for the assignment of teachers and administrators which will effectively promote racial balance of the respective staffs in each school.
>
> 5. Establishment of practices for the assignment of teachers and administrators which will effectively promote equalization of competence in teaching and administration at all schools.
>
> 6. Avoidance of use of tracking systems or other educational techniques or innovations without provision for safeguards against racial segregation as a consequence.

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[4] The Court itself will not hesitate to appoint one or more consultants to assist it, should that later become necessary or advisable. Regarding the Court's power to do so, *see* Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir. 1970) at 148.

The foregoing delineation is not intended to limit the scope of the plans to be filed nor to hamper creativity by those who prepare them nor to specify details better spelled out by qualified experts in education. The intent, rather, is to indicate requirements which, in the light of the facts before the court, are necessary for compliance with the law.

That is the thrust of all of this—the law must be obeyed. The court fully understands that public opinion is divided on many questions relating to desegregation of our schools. But disagreement with the law is no justification for violation. And, where as here, segregation in our schools has been fostered by action and inaction over a long period of years, the law requires corrective measures.

The court fully understands, too, the many complicated, difficult, and serious problems which must be solved. They run the gamut from those of finance and geography and personnel on through to the emotional. But the difficulties are far from insurmountable. A genuine will to meet and overcome them is the first requisite.[5]

The stakes are surely high enough to generate that will. Respect for law in the education of the elementary schoolchildren of the city of today can do much to reduce crime on the streets of the city of tomorrow.

In any case, the court, as heretofore, retains jurisdiction to take such further action at any time as it may deem necessary to provide for compliance with the Constitution and laws of the United States.

Stanley A. Weigel,
U.S. District Judge.

Dated: April 28, 1971.

SUPPLEMENTARY FINDINGS OF FACT AND CONCLUSIONS OF LAW

I—Preliminary

The findings and conclusions set out in the "Memorandum and Order Requiring the Parties To File Plans for School Desegregation" dated April 28, 1971, are hereby incorporated herein by reference and the findings and conclusions herein are hereby, nunc pro tunc, incorporated therein. Provision was made in said Memorandum and Order for supplemental findings and conclusions (see F.N.—p. 3, lines 13–17) and, on May 28, 1971, plaintiffs and defendants stipulated in open court for the filing of such additional findings and conclusions.

II—Definitions

Unless the context requires otherwise, the following words have the following respective meanings as used in the Findings of Fact and

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[5] ". . . The problem of changing a people's mores, particularly those with an emotional overlay, is not to be taken lightly. It is a problem which will require the utmost patience, understanding, generosity and forbearance from all of us, of whatever race. But the magnitude of the problem may not nullify the principle. And that principle is that we are, all of us, freeborn Americans, with a right to make our way, unfettered by sanctions imposed by man because of the work of God." J. Skelly Wright speaking in Bush v. Orleans Parish School Board, 138 F. Supp. 337 (E. D. La. 1956) at 342.

Conclusions of Law herein. "District" means the San Francisco Unified School District, the board of education thereof, all officers and agents of said district and/or said board including the superintendent of said district. "Schools" means the elementary schools of the district.

III—Findings of Fact

1. The schools are racially segregated. Over one-half (54 of the total of 102) of the schools have racial compositions which make each of them black or nonblack in that the racial composition of the student bodies of each varies so excessively from the racial composition of the district's total school population. Eighty percent of the district's black children are concentrated (by district attendance regulations) in 27 schools in which the respective student bodies range from 47.3 black to 96.8 percent black. The district's total school population is only 28.7 percent black. In only two of these 27 schools are black children even slightly in the minority and in only four others are the student bodies less than 71 percent black. Segregation in the schools is also shown by consideration of 27 schools which, under attendance rules laid down by the district, have so few black children as to be identifiably nonblack schools. In these 27 schools, the percentage of black students ranges from a maximum of 6.9 percent to the irreducible minimum of 0.0 percent. The chart below shows the striking degree of racial imbalance evidenced in the 54 schools:

Col. A	Percent black students	Col. B	Percent black students
1. Hunters Point II	96.8	Cleveland	6.9
2. Golden Gate	96.1	Alamo	6.7
3. Jedediah Smith	95.9	Glen Park	6.3
4. Sir Francis Drake	95.8	Fairmount	6.1
5. Jedediah Smith Annex	93.7	Lakeshore	6.0
6. Sheridan	92.3	Excelsior	5.9
7. Burnett	92.2	Kate Kennedy	5.7
8. Ortega	91.7	Sutro	5.3
9. Bret Harte	91.2	Hawthorne	4.7
10. Bay View	90.2	Lafayette	4.7
11. John Muir	89.9	Edison	3.8
12. Anza	89.5	Guadalupe	3.8
13. Emerson	88.0	Cabrillo	3.6
14. John Swett	85.7	R. L. Stevenson	3.1
15. Starr King	84.7	Clarendon	3.0
16. I. M. Scott	84.4	Columbus	2.4
17. Fremont	81.2	Argonne	2.3
18. Raphael Weill	75.4	Douglas	2.3
19. Dudley Stone	74.9	P. A. Hearst	1.6
20. Andrew Jackson	72.9	West Portal	1.4
21. Farragut	71.8	Washington Irving	1.3
22. Lincoln	65.7	Commodore Stockton	1.1
23. John McLaren	62.5	Alvarado	1.0
24. McKinley	61.7	Parkside	1.0
25. Candlestick Cove	54.2	Jean Parker	.2
26. San Miguel	49.7	Spring Valley	.1
27. Daniel Webster	47.3	Garfield	0

This table is derived from plaintiffs' exhibit 1 "Racial Estimates of Pupils Attending San Francisco Public Schools" [hereafter exhibit

1], and plaintiffs' exhibit 2, "Estimates of the Racial Distribution of Pupils Atending San Francisco Public Schools Arranged in Descending Order of Percentages for 1969 and Trends Since 1966" [hereafter exhibit 2]. The percentages are based on actual attendance for 1969, and represent the most current compilations available. It should be noted, in addition, that white students are a majority in most of the nonblack schools, whereas no predominantly black school is as much as one-third white. In fact, only five of these schools are more than 15 percent white. Exhibit 2.

2. In addition to these 54 schools which the court finds to be racially identifiable, there are still other schools which are "racially imbalanced" within the standards set out by the State of California. Title 5, section 14021(C) of the California Administrative Code provides that a school is racially imbalanced if the percentage of pupils of one or more racial or ethnic groups differs by more than 15 percentage points from that in all the schools of the district. Since 28.7 percent of school pupils in the district are black, a school is racially imbalanced under State law if the percentage of black students is more than 43.7 percent or less than 13.7 percent. Eighty-six of the district's 102 schools are racially imbalanced on that standard. The only schools (16 out of 102) not racially imbalanced under the standard are: Bessie Carmichael, Commodore Sloat, Corbett, Diamond Heights, E. R. Taylor, Geary, Grant, Laguna Honda, Lawton, LeConte, Marshall, Miraloma, Noriega, Sunnyside, Winfield Scott, and Yerba Buena. Exhibits 1 and 2.

3. Segregation in identifiably black elementary schools in the district has increased in recent years. Defendants have been on notice of this increase through annual reports of the district's human relations officer. The following table illustrates the degree to which 21 schools which were identifiably black in 1964 have become increasingly sò in 5-year period from 1964 to 1969:

School	Percent black students 1964	Percent black students 1969
Andrew Jackson	66	72. 9
Bay View	80	90. 2
Bret Harte	76	91. 2
Burnett	85	92. 2
Daniel Webster	42	47. 3
Dudley Stone	66	74. 9
Farragut	61	71. 8
Fremont	64	81. 2
Golden Gate	95	96. 1
Hunters Point II	94	96. 8
I. M. Scott	63	84. 4
Jedediah Smith	89	95. 9
John Muir	85	89. 9
John Swett	85	85. 7
Lincoln	60	65. 7
McKinley	43	61. 7
Ortega	91	91. 7
San Miguel	45	49. 7
Sheridan	91	92. 3
Sir Francis Drake	91	95. 8
Starr King	57	84. 7

Compare plaintiff's exhibit 7, "Racial Estimates of Pupils Attending San Francisco Public Schools" (October 1964) with exhibit 1.

4. Without corrective action by the district, segregation will continue to increase. In September 1966, the district contracted with Stanford Research Institute [hereafter SRI] to study alternative means by which racial imbalance in San Francisco's public schools might be diminished. In response to a request for admissions made by plaintiffs, defendants admitted that the SRI reports were prepared by qualified experts in the field of statistical research. The SRI study projected that there would be an increased number of black students which would result, absent corrective action by the district, in an increased number of black students at schools already predominantly black. That projection was not acted upon by the district, and the prediction has been borne out. Plaintiffs' exhibit 24, "Population Projection to 1971."

5. Black students in identifiably black schools do not perform as well as they would perform in an integrated school. SRI examined and evaluated both the U.S. Commission on Civil Rights survey, "Equality of Educational Opportunity" (popularly known as the Coleman report) and the Commission's report, "Racial Isolation in the Public Schools", as part of its study. SRI agreed with the findings of the Coleman report that "[a]ttributes of other students account for far more variation in the achievement of minority group children than do attributes of school facilities and slightly more than do attributes of staff." Plaintiffs' exhibit 26, "Educational Organization for Desegregation," at 9 [hereafter exhibit 26]. In short, SRI found that achievement of Negro students was increased with the increasing degree of integration. Elementary school teachers in the district support the findings of SRI by reporting that children transported from schools in predominantly black areas to other schools show an increase in their range of academic ability and interests. Plaintiffs' exhibit 27, "Adapting to Changing Racial and Ethnic Composition: A Survey of San Francisco Teachers and Principals," at 40 [hereafter exhibit 27]. See also, deposition of William L. Cobb, Ph. D., July 14, 1970, at 48 [hereafter "Cobb deposition"]; deposition of Isadore Pivnick, July 14, 1970, at 16–17 [hereafter "Pivnick deposition"]. Pupils in the 27 identifiably black schools, in fact, score lower on standardized reading tests than other pupils. Affidavit of Maureen O'Sullivan, Ph. D., July 16, 1970.

6. While integration of schools would improve the academic performance of black children, it would have little or no adverse effect on the academic performance of white children. Plaintiffs' exhibit 25, at 21, "Dimensions of Equality of Educational Opportunity" [hereafter exhibit 25]; exhibit 26, at 12–13.

7. Integration of public schools, including elementary schools, would decrease the number of dropouts, especially among black students who presently exhibit strong tendencies to drop out of school. Exhibit 25, at 1, 9–10.

8. Integration is most important at the elementary school level. Variations in the racial context of the elementary school make for a substantial and significant difference in subsequent academic success at higher grade levels. Affidavit of Alan B. Wilson, Ph. D., July 9,

1970; deposition of Laurel E. Glass, Ph. D., July 20, 1970, at 20 [hereafter "Glass deposition"]; Plaintiffs' exhibit 31, "Educational Equality/Quality Report No. 1—Program Alternatives," at 11. Furthermore, a U.S. Office of Education survey shows that white students who first attend integrated schools early in their schooling are likely to value their association with black students more than students who attend schools with black children starting later in grades. Exhibit 25, at 21.

9. Segregation tends to stigmatize black children and lower their self esteem. This was the finding of the U.S. Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954), and it is supported by the findings of the Coleman report and SRI. Plaintiffs' exhibit 25, at 19. See also, affidavit of Alan B. Wilson, July 9, 1970. Dr. Laurel E. Glass, a member of the San Francisco Board of Education since 1967 and its president in 1969, concludes that black children and their parents view the segregation in San Francisco as purposefully designed to separate the races. Dr. Glass concludes that this feeling reinforces the black child's feeling of inferiority. Glass deposition, at 17–19.

10. The stigmatizing effect of public segregation is aggravated by the low proportion of black teachers and administrators hired by the district. Black personnel constitute only 9 percent of the district's full-time elementary school teachers and only 8 percent of its administrators. Exhibit 14; plaintiffs' exhibit 27, at 20.

11. Until very recently, the district has made few efforts to increase the number of black teachers in public elementary schools. Even after the board of education authorized the district to implement a program of racial balance among teachers in March 1968, the board's use of the national teachers exam as part of the selection process disqualified otherwise qualified black applicants and hindered the achievement of racial balance. Affidavit of Robert Seymour, July 17, 1970.

12. The stigmatizing effect of public assignment and hiring practices is further aggravated by the district's teacher and administrator assignment policies. Nine of the district's 12 black administrators are assigned to schools which are included in the 27 schools found to be identifiably black schools. A disproportionately large number of black teachers—112 of the district's 175 black teachers—are assigned to the 27 identifiable black schools. Sixty-four percent of the black elementary school teachers are assigned to approximately 27 percent of the schools in the district. In contrast only nine black teachers are employed in the 27 schools listed above as identifiably nonblack schools. Exhibit 14; exhibit 27. These employment assignments are not voluntary; most of the black teachers would prefer assignment to nonblack schools. Exhibit 27, at 36.

13. Teachers assigned to identifiably black elementary schools receive significantly lower salaries than teachers assigned to identifiably white schools. This lower salary level reflects a lower level of academic background, and a lower level of teaching experience. Glass deposition, at——; Cobb deposition, at 104–105. The tables following compare the average monthly salaries of full-time teachers in identifiably black schools with those in identifiably nonblack schools.

Average monthly salaries of teachers in identifiably black schools

School	Salaries											Total
	$551 to $600	$601 to $650	$651 to $700	$701 to $750	$751 to $800	$801 to $850	$851 to $950	$951 to $1,000	$1,001 to $1,100	$1,101 to $1,200	$1,201 to $1,300	
1. Andrew Jackson	1			4	1	1	3			5	2	17
2. Anza	1		2	4	3		4	1	1	4	2	22
3. Bayview	1	1	1	7	2	3	2	1		3		21
4. Bret Harte	1		2	4		1	7	1	1	2	3	22
5. Burnett		1	6	6		2	7	1	1	1		25
6. Candlestick Cove		1	2		1	1	1		1	1	4	12
7. Daniel Webster	3		3	3	1	1	3			3	7	24
8. Dudley Stone	3	2	4	6	1		3	1		3	2	25
9. Emerson	1	1	1	1	1		1	1	2	3	4	16
10. Farrigut			1	2	3		3			6	4	19
11. Fremont	3	1	5	2	1	2	1				2	17
12. Golden Gate	1		3	6	4	1	6	2	2	4	3	32
13. Hunters Point II			2	2		1	2		2	2	1	12
14. I. M. Scott			1	1					1	1	1	5
15. Jedediah Smith and Annex	2	2	7	5	5		3	2	3	4	1	34
17. John McLaren	2	1	5	7	4	1	4	1		4	1	30
18. John Muir	1	4	7	9	4	1	5	1	2	3	1	38
19. John Swett			2	7		1		1		2	3	16
20. Lincoln			1	1	3					1		6
21. McKinley	1		2	8	2	1	1		6	4	2	27
22. Ortega	1		3	7	2	2	3		2	2	2	24
23. Raphael Weill	2	2	5	6	9	2	4		2	4	1	37
24. San Miguel		1	2	2	2	1	2	1	4	2	3	20
25. Sheridan	2	2	8	5	2	1	2	1	1	1	1	26
26. Sir Francis Drake	1	2	2	5	6	3	4	3	2	3	1	32
27. Starr King	1		3	6	1	2	3	1	1	3	3	24
Total	28	21	80	116	58	28	74	19	34	71	54	583

Average monthly salaries of teachers in identifiably nonblack schools

1. Garfield		1	2	1		1	1	2		6	2	16
2. Spring Valley		1		3		5		2	2	8	6	27
3. Jean Parker			1	3	1	2	3		2	5	5	22
4. Parkside			2	2		2		1	1	8	3	19
5. Alvarado			2	5	1	1	4		2	8	1	24
6. Commodore Stockton	1	1	4	5		4	11		6	5	16	53
7. Washington Irving					2	2	2			3	3	12
8. West Portal			1	1	2	1	3		2	4	8	22
9. P. A. Hearst					1				1	1	2	5
10. Douglas			3	4			1	1	1		1	11
11. Argonne					3	3	1		4	4	5	20
12. Columbus				4		1	1	1	1	4		12
13. Clarendon			1	2	1	2	2		1	2	2	13
14. R. L. Stevenson		1	1		1				1	8	4	16
15. Cabrillo				2	1		2			2	2	9
16. Guadalupe				2		1	1		2	3	8	17
17. Edison			7	1	5	1	4	1	2	3	1	25
18. Lafayette			1	1	1	1	4	1	6	4	6	25
19. Hawthorne	2	1	1	7	3	2	6	1		5	2	30
20. Sutro	1		1	3	2		3	1	1	4	6	22
21. Kate Kennedy	1			5	1		2	1	2			12
22. Excelsior	1			1			2	1		1	2	8
23. Lakeshore	1	1	1	4	2	1	1		1	6	3	21
24. Fairmount	1	1	3	4	3		5	1	3	4	4	29
25. Glen Park			1	2	1	1	2		1	3	6	17
26. Alamo			2	2			5	1	2	4	6	22
27. Cleveland			3		1	1	4		2		5	16
Total	8	7	37	64	32	32	70	15	46	105	109	525

Percentage of teachers by salary range and school type

School	Salaries											
	$551 to $600	$601 to $650	$651 to $700	$701 to $750	$751 to $800	$800 to $850	$851 to $950	$951 to $1,000	$1,001 to $1,100	$1,101 to $1,200	$1,201 to $1,300	Total
Identifiably black schools		5	3	14	20	10	5	12	3	6	12	9
Identifiably nonblack schools		2	1	7	12	6	6	13	3	9	20	21

The tables indicate that 50 percent of the teachers in nonblack schools earn $1,000 or more per month, while only 27 percent of the teachers in predominantly black schools earn such salaries. Since teachers with the highest salaries are the most experienced, it is apparent that more highly qualified and experienced teachers are assigned to nonblack schools. At the same time, many more inexperienced teachers are assigned to black schools than nonblack ones. The tables show that 22 percent of the teachers in black schools are in the lowest three salary categories, compared to only 10 percent in nonblack schools. Plaintiffs' exhibit 14.

14. The lower educational achievement of children in identifiably black schools, as described in finding 6, is caused in part by the fact that the teachers in those schools have lower levels of academic background and teaching experience. The SRI found that the average educational preparation and years of teaching experience of teachers correlated positively with pupil achievement. Exhibit 26, at 10–11. See also affidavit of Maureen O'Sullivan, Ph. D., July 16, 1970.

15. The San Francisco Board of Education, at least as early as February 4, 1969, had knowledge that teacher salaries, academic background, and teaching experience were lower in schools with predominantly black student bodies than in other schools, and that such factors tend to prejudice the educational achievement of the students in the predominantly black schools. Cobb deposition, at 104; exhibit 26, at 10–11. Despite such knowledge, the district has taken no corrective action.

16. The San Francisco Board of Education has had knowledge since 1967 of the recommendation of SRI that the highest quality teachers should be assigned to schools enrolling a large proportion of minority students. Plaintiffs' exhibit 25, at 1. This recommendation has not been followed. See findings 13, 14.

17. Class size in predominantly white schools is significantly smaller than in predominantly black schools. While additional teachers may sometimes be assigned to predominantly black schools in which there are a number of children below grade level in the basic subjects, class size is not thereby reduced. Plaintiffs' exhibit 22, "Report of the Ad Hoc Committee of the Board of Education To Study Ethnic Factors in the San Francisco Public Schools," at 17.

18. School attendance zones have been and are drawn and modified by the district in ways which increase racial segregation significantly beyond demographic segregation. The district has the power to draw school attendance zones and exercises that power. Glass deposition, at 20; exhibit 22, at 7. It is not unusual for as many as 20 of the 102 school attendance zones to be revised in a single year. Exhibit 21B, "The Proper Recognition of a Pupil's Racial Background in the San Francisco Unified School District," at 5 [hereafter exhibit 21B]. The board is empowered—indeed required—to consider the reduction of racial imblance in decisions on districting. See, title 5, California Administrative Code, sections 14020–14021; Cobb deposition, at 53–57. The board had knowledge of means of redistricting which would substantially decrease racial imbalance. The SRI study showed that racial balance could be improved by as much as 10 percent in individual schools if attendance boundries were redrawn. Plaintiffs' exhibit 29, "Evaluation of Alternative Attendance Patterns To Improve Racial

Balance," at 13 [hereafter exhibit 29]. In addition, districting decisions were made with the assistance of the district's human relations officer, whose job it was to minimize segregation in public schools. Cobb deposition, at 53–57. Despite this knowledge, and despite the power to redistrict, and the frequency of redistricting, the district never once revised school attendance districts for the purpose of improving racial balance. Cobb deposition, at 54–57. Rather, it chose to maintain an official districting policy established in 1936—"pupils in elementary schools shall be enrolled in the schools which are nearest or most convenient to their homes." Exhibit 21B, at 5.

19. The district constructed new buildings and additions to old buildings in a manner which perpetuated and exacerbated existing racial imbalance. For example:

(*a*) In 1963, an addition to Golden Gate Elementary School was built. At that time, Golden Gate was predominantly black. Today, the school is 96.1 percent black. Cobb deposition, at 84. Exhibit 1.

(*b*) The San Francisco Board of Education has authorized a new school to be built to replace the Bay View School. This authorization was made despite the warning by Dr. William L. Cobb, human relations officer of the district, that construction of a new school at the same location would result in increased segregation. Cobb deposition, at 94. Bay View is currently 90.2 percent black. Exhibit 1.

(*c*) In 1967, an addition was built to Raphael Weill Elementary School. At that time, Raphael Weill was 71.9 percent black. It is now 75.4 percent black. Exhibits 1 and 2. Dr. Cobb was not consulted. Cobb deposition, at 21.

(*d*) An addition was built to Bret Harte Elementary School in 1970 despite the warning by Dr. Cobb that the addition would result in increased segregation. Cobb deposition, at 79. Prior to construction, Bret Harte was 91.2 percent black. Exhibit 1.

(*e*) In 1969, an addition was built to Burnett Elementary School. At that time, Burnett was 92.2 percent black. Exhibit 1.

20. Although the district had the power and duty under State law to consider the prevention and elimination of racial imbalance in its construction plans and choice of school sites, title 5, California Administrative Code, sections 14020–14021, the district has failed to consider racial balance in construction plans. Dr. Laurel E. Glass, a member of the board of education since 1967, and its president in 1969, testified that since she has been on the board, racial factors have not been discussed when construction of a new school is planned. Glass deposition, at 54. In many instances when new construction was planned, the district failed to consult the human relations officer, its own officer given the responsibility of guarantying equal educational opportunity to all students. Cobb deposition, at 11, 76. When the human relations officer was consulted, his recommendations against the construction of certain buildings, based upon a showing of perpetuating or furthering racial imbalance, were disregarded by the district. See finding 19; Cobb deposition, at 79, 94.

21. The board has failed to respond to the recommendation of its own expert agency, SRI, on racial balance. The SRI recommendations described in findings 16 and 18 (teachers and districting) are just a

few of those which have been ignored. The SRI, in 1966, presented the district with 12 specific attendance alternatives designed to reduce segregation in the schools. These alternatives ranged from plans as simple as redistricting to those as complex as using crossbusing to pair schools with predominantly black student bodies with schools with predominantly white student bodies in order to achieve racial balance. Exhibit 29. None of these alternatives has been pursued.

22. Recommendations made by the Report of the Citizens' Advisory Committee to the superintendent's task force studying education equality/quality and other proposals (plaintiffs' exhibit 32) have not been followed. That committee's key proposal for significantly improving racial and ethnic balance at the elementary level was the establishment of two complexes of elementary schools known at the Richmond Elementary complex and the Park-South elementary complex. Exhibit 32, at 10. As worked out and proposed by the committee, the Richmond complex would have included at least 12 schools having an enrollment of 6,800 students, and Park-South would have included at least eight schools with 4,200 students. Exhibit 32, at 9.

Because the advisory committee viewed the complexes as a major achievement in integration, the superintendent of schools urged the district to implement the complexes in September 1970. Exhibit 32, at 7; plaintiffs' exhibit 33, "Educational Equality/Quality Report No. 3. Time for Action!" On June 10, 1969, the district accepted the recommendation of the superintendent with the understanding that implementation of the complexes in September 1970 was conditioned on firm commitments of adequate funding. Plaintiffs' exhibit 34, "Educational Equality/Quality, Progress Report on the Planning for Implementation of the Superintendent's Educational Equality/Quality Report No. 3—Time for Action—approved in principle by Board of Education, June 10, 1969" (hereafter exhibit 34). Although the superintendent recommended that half the funding for the complexes be supplied by the district and half by outside sources, the district, while able to carry out that recommendation, agreed to provide only $1,200,000 of the estimated $2,800,000 necessary to fully implement the complexes. Exhibit 34, at 10–12; plaintiffs' exhibit 35, "Educational Equality/Quality, progress report on Park-South and Richmond complexes." Ultimately, the board decided that there were insufficient funds to proceed with both complexes and determined to proceed only with the Richmond complex and to indefinitely postpone Park-South. Plaintiffs' exhibit No. 38, "Minutes, special meeting, Board of Education, Wednesday, May 27, 1970, 7 P.M."

In voting to postpone Park-South and proceed only with the Richmond complex, the board voted against the recommendation of the superintendent that both complexes be implemented within the limits of the budget. The Board also voted against the recommendation of the citizens advisory councils of both complexes, which made the same recommendation as the superintendent. These advisory councils were groups of lay people from each of the complex areas, appointed by Isadore Pivnick, assistant superintendent for innovative planning and coordinator of the complexes, to advise him on community feelings about the complexes. Plaintiffs' exhibit 37, "Minutes, regular meeting, Board of Education, Tuesday, May 19, 1970, 4 U.M."; Glass deposition, at 59–60, 66; Pivnick deposition, at 29, 55–56.

Had Park-South been implemented, racial imbalance would have been eliminated in the eight schools comprising the complex. Cobb deposition, at 97. Two of the 27 schools with identifiably black student bodies, Dudley Stone (74.9 percent black) and McKinley (61.7 percent black), would have been included in the complex, and the percentage of blacks in those schools would have been reduced to approximately 35 percent. Pivnick deposition, at 25. Nevertheless, the board decided to postpone indefinitely implementation of the complex for lack of funding.

Much of the difficulty in raising funds for the complexes is attributable to the board's reluctance to commit irrevocably its own funds to the project. Pivnick deposition, at 38–39. Despite the funding problems, enough money had been raised to provide for both complexes, although not all of the quality components upon which the board had insisted could have been guaranted. Pivnick deposition, at 53. In choosing, on or about May 27, 1970, to postpone implementation of Park-South, the district not only rejected the recommendation of the superintendent, the citizens advisory councils, and the citizens' advisory committee to the superintendent's task force, but also concomitantly delayed desegregation of all other schools in the city. Pivnick deposition, at 56–57.

23. While the district has bused public school children since 1946 for the purpose of eliminating overcrowded conditions in certain schools, busing has never been utilized to eradicate or reduce segregation. Plaintiffs' exhibit 13, "A Twenty-Year History of Pupil Transportattion in the San Francisco Public School"; Cobb deposition, at 61. District busing has been restricted to moving black students to predominantly white schools—never the reverse. Exhibit 22, at 13–14. Recommendations to the district by the human relations officer that busing be utilized to achieve racial balance in the schools have been rejected. Cobb deposition, at 63.

24. Aside from implementation of the Richmond complex, the district has neither made nor accepted any concrete proposals to improve the racial balance of the schools. The only action taken by the district has been to support an Ocean View-Merced Heights project involving six schools, and to support a Hunters Point redevelopment project. Glass deposition, at 26. The Ocean View-Merced Heights project has been a disaster, resulting in increased rather than decreased segregation. In fact, four of the six schools therein involved number among the 27 identifiably black schools. Glass deposition, at 30; exhibit 1. The Hunters Point redevelopment project calls for bringing light industry into the Hunters Point area to generate jobs, for improved housing, and ultimately for integration of the schools, by drawing white families into the area in search of employment. Glass deposition, at 26. While providing a possibility of integration at some distant future time, this project by no means even guarantees that.

25. A tracking system or any other system of classifying students which causes students of different races to be separated into different classes, or students of disparate abilities to be classed separately, would defeat the objectives of integration. Exhibit 27, at 41.

IV—Conclusions of Law

1. This court has jurisdiction of the parties and the subject matter of this action under the Civil Rights Act, 28 U.S.C. 1343(3).

2. Rights guaranteed by the 14th amendment of the U.S. Constitution apply to all public elementary school systems. Those rights may not be infringed by State or local law authorizing or permitting or providing for racial discrimination. *Swann* v. *Charlotte-Mecklenberg Board of Education*, (39 U.S.L.W. 4437, 4440–4441 (U.S. April 20, 1971)); *United States* v. *School District 151* (286 F.Supp. 786, 797 (N.D. Ill.), aff'd, 404 F.2d 1125 (7th Cir. 1968)); *Taylor* v. *Board of Education* (191 F.Supp. 181, 182–83 (S.D.N.Y.), aff'd, 294 F.2d 36 (2d Cir.), cert. denied, 368 U.S. 940 (1961)); *Clemons* v. *Board of Education* (228 F.2d 853, 859 (6th Cir. 1956)); *Spangler* v. *Pasadena City Board of Education* (311 F.Supp. 501, 521 (C.D. Cal. 1970)).

3. This court has jurisdiction to hear and to decide all issues concerning alleged discrimination in the schools of the district, including policies involving the assignment of students, the allocation and hiring of faculty and administrators, and the location and construction of schools. *Swann* v. *Charlotte-Mecklenberg Board of Education* (39 U.S.L.W. 4437 (U.S. April 20, 1971)); *United States* v. *School District 151* (286 F.Supp. 786 (N.D. Ill.), aff'd, 404 F.2d 1125 (7th Cir. 1968)); *United States* v. *Jefferson County Board of Education* (372 F.2d 836, aff'd en banc, 380 F.2d 385 (5th Cir. 1967), cert. denied, sub nom. *Caddo Parish School Board* v. *United States* (389 U.S. 840 (1967)); *Lee* v. *Macon County Board of Education* (267 F.Supp. 458 (M.D. Ala.), aff'd sub nom.) *Wallace* v. *United States* (389 U.S. 215 (1967)).

4. By assigning the least experienced and least qualified teachers to schools with predominantly black student bodies, and by maintaining larger classes in these schools than in schools with predominantly white student bodies, the District has denied black students equal protection of the law. *Coppedge* v. *Franklin County Board of Education* (273 F.Supp. 289, 299 (E.D. N.C. 1967), aff'd, 394 F.2d 410 (4th Cir. 1968)); *Kelley* v. *Altheimer* (378 F.2d 483, 499 (8th Cir. 1967)); *Spangler* v. *Pasadena City Board of Education* (311 F.Supp. 501 (C.D. Cal. 1970)).

5. The fact that the district assigns the great majority of its black teachers to schools where the students are predominantly black, constitutes a practices of advancing segregation and places upon the district the burden of showing that it did not cause such segregation, especially in light of the fact that most black teachers want other assignments. *Davis* v. *School District* (309 F.Supp. 734, 743 (E.D. Mich. 1970)); cf., *Chambers* v. *Hendersonville City Board of Education* (364 F.2d 189, 192 (4th Cir. 1966)); *Rolfe* v. *County Board of Education* (391 F.2d 77 (6th Cir. 1968)). This burden has not been met by the district and the court accordingly concludes that segregation of school faculties is the direct result of district action.

6. Assignment of teachers on a racial basis so that teachers are assigned to schools attended by children of their race tends to establish racially identifiable schools. Such assignment deprives students of their right to be free of racial discrimination in the operation of public elementary schools and is de jure segregation in violation of the 14th

amendment. *Rogers* v. *Paul* (382 U.S. 198 (1965)); *Bradley* v. *School Board* (382 U.S. 103 (1965)); *Green* v. *County School Board* (391 U.S. 430 (1968)); *United States* v. *School District 151* (286 F.Supp. 786, 797 (N.D. Ill.), aff'd, 404 F.2d 1125 (7th Cir. 1968)); *Spangler* v. *Pasadena City Board of Education* (311 F. Supp. 501, 523 (C.D. Cal. 1970)); *Davis* v. *School District* (309 F.Supp. 734, 744 (E.D. Mich 1970)); *Hobsen* v. *Hanson* (269 F. Supp. 401, 501–503 (D. D.C. 1967), appeal dismissed, 393 U.S. 801 (1968)).

7. Assignment of 75 percent of black school administrators to the same schools where most black teachers are assigned, and where most students are black, increases the segregated nature of these schools, and therefore deprives students of their right to be free of racial discrimination in the operation of public schools and is de jure segregation in violation of the 14th amendment. *United States* v. *School District 151* (286 F.Supp. 786, 798–99 (N.D. Ill.), aff'd, 404 F.2d 1125 (7th Cir. 1968)); *Coppedge* v. *Franklin County Board of Education* (273 F.Supp. 289, 299, 300 (E.D. N.C. 1967), aff'd, 394 F.2d 410 (4th Cir. 1968)); *Spangler* v. *Pasadena City Board of Education* (311 F. Supp. 501, 523 (C.D. Cal. 1970)); *Hobsen* v. *Hanson* (269 F.Supp. 401, 501–03 (D. D.C. 1967), appeal dismissed, 393 U.S. 801 (1968)).

8. Defendants are under a constitutional obligation to take affirmative remedial action to desegregate the faculties and administrative staffs of the public elementary schools forthwith. *United States* v. *Montgomery Board of Education* (395 U.S. 225 (1969)); *United States* v. *School District 151* (286 F.Supp. 786, 797 (N.D. Ill.), aff'd, 404 F.2d 1125 (7th Cir. 1968)); *Clark* v. *Board of Education* (369 F.2d 661, 669 (8th Cir. 1966)); *United States* v. *Jefferson County Board of Education* (372 F.2d 836, 893, aff'd en banc, 380 F.2d 385 (5th Cir. 1967), cert. denied, sub nom.) *Caddo Parish School Board* v. *United States* (389 U.S. 840 (1967)); *Spangler* v. *Pasadena City Board of Education* (311 F.Supp. 501, 523 (C.D. Cal. 1970)); *Davis* v. *School District* (309 F.Supp. 734, 744 (E.D. Mich. 1970)).

9. The responsibility for faculty and administration desegregation is defendants', not the teachers and administrators. The constitutional prohibition against segregation in public schools may not be made contingent upon the preferences of teachers or the administrative staff. If necessary to further desegregation, faculty and administrators must be assigned involuntarily to schools. *United States* v. *School District 151* (286 F. Supp. 786, 798 (N.D. Ill.), aff'd, 404 F. 2d 1125 (7th Cir. 1968)); *United States* v. *Board of Education* (396 F. 2d 44 (5th Cir. 1968)); *David* v. *Board of School Cmmissioners* (393 F. 2d 690 (5th Cir. 1968)); *Spangler* v. *Pasadena City Board of Education* (311 F. Supp. 501, 523 (C.D. Cal. 1970)); *Davis* v. *School District* (309 F. Supp. 743, 744 (E.D. Mich. 1970)); *Kier* v. *School Board* (249 F. Supp. 239 (W.D. Va. 1966)).

10. The evidence presented by the parties is insufficient to demonstrate the reasons why there are unconscionably few black teachers and administrators presently employed by the district. Having found, however, that other acts of defendants resulted in de jure segregation, the court has the power to insure that defendants will not discriminate against blacks in hiring future teachers and administrators, and the power to require the district to actively pursue a policy of hiring

blacks for these positions. *Swann* v. *Charlotte-Mecklenberg Board of Education* (39 U.S.L.W. 4437, 4442–4443 (U.S. April 20, 1971)); *Board* v. *Board of Education* (349 U.S. 294, 300–301 (1955); *Hobsen* v. *Hansen* (269 F. Supp. 401, 516 (D. D.C. 1967), appeal dismissed, 393 U.S. 801 (1968)).

11. The manner in which the district formulated and modified attendance zones for elementary schools had the inevitable effect of perpetuating and exacerbating existing racial segregation of students. Such conduct constitutes de jure discrimination in violation of the 14th amendment. *United States* v. *School District 151* (286 F. Supp. 786, 795–796, 798 (N.D. Ill.), aff'd, 404 F. 2d 1125 (7th Cir. 1968)); *Brewer* v. *City of Norfolk* (397 F. 2d 37, 40–42 (4th Cir. 1968)); *United States* v. *Jefferson County Board of Education* (372 F. 2d 831, 867–868 (5th Cir. 1965), aff'd en banc, 380 F. 2d 385 (1966), cert. denied, 389 U.S. 840 (1967)); *Taylor* v. *Board of Education* (294 F. 2d 36 (2d Cir.), cert. denied, 368 U.S. 940 1961)); *Spangler* v. *Pasadena City Board of Education* (311 F. Supp. 501, 522 (C.D. Cal. 1970)); *Davis* v. *School District* (309 F. Supp. 743, 744 (E.D. Mich. 1970)).

12. By building new elementary schools and additions to old schools in a manner that perpetuated and exacerbated existing segregation of elementary school pupils, the district caused de jure segregation in violation of the 14th amendment. *Swann* v. *Charlotte-Mecklenberg* (39 U.S.L.W. 4442, 4443 (U.S. Apr. 20, 1971)); *United States* v. *Montgomery County Board of Education* (395 U.S. 225, 231 (1969)); *Lee* v. *Macon County Board of Education* (267 F. Supp. 458, 472, 480 (M.D. Ala.), *aff'd*, 389 U.S. 215 (1967)); *United States* v. *Board of Public Instruction* (395 F. 2d 66, 69 (5th Cir. 1965)); *United States* v. *School District* 151, (276 F. Supp. 786, 800 (N.D. Ill.), *aff'd*, 404 F. 2d 1125 (7th Cir. 1968)); *Brewer* v. *City of Norfolk* (397 F. 2d 37 (4th Cir. 1968)); *Spangler* v. *Pasadena City Board of Education* (311 F. Supp. 501, 517–519 (C. D. Cal. 1970)); *Davis* v. *School District* (309 F. Supp. 734, 741 (E.D. Mich. 1970)).

13. A school board may not, consistently with the 14th amendment, maintain segregated elementary schools or permit educational choices to be influenced by a policy of racial segregation in order to accommodate community sentiments or the wishes of a majority of voters. *Cooper* v. *Aaron* (35 U.S. 1, 12–13, 15–16 (1958)); *Lucas* v. *Forty-Fourth General Assembly* (377 U.S. 713, 736–737 (1964)); *Hall* v. *St. Helena Parish School Board* (197 F. Supp. 649, 659 (E.D. La.), *aff'd* 368 U.S. 515 (1961)); *Reitman* v. *Mulkey* (387 U.S. 369 (1967)); *Monroe* v. *Board of Commissioners* (391 U.S. 450 (1968)); *United States* v. *School District 151* (286 F. Supp. 786, 798 (N.D.), *aff'd*. 404 F. 2d 1125 (7th Cir. 1968)); *Spangler* v. *Pasadena City Board of Education* (311 F. Supp. 501, 523 (C.D. Cal. 1970)).

14. This Court has pendent jurisdiction over plaintiffs' claim that racial segregation also violates State law. *United Mine Workers* v. *Gibbs* (383 U.S. 715, 725 (1966)); *Rose* v. *Wyman* (397 U.S. 397, 404–405 (1970)); *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers* (398 U.S. 281, 295, (1970)); *Gem Corrugated Box Corp.* v. *National Kraft Container Corp.* (427 F. 2d 499 (2d Cir. 1970)); *Miller Equipment Co.* v. *Colonial Steel and Iron Co.* (383 F. 2d 669 (4th Cir. 1967)). See also 42 U.S.C. section 1988.

15. Plaintiffs are entitled to seek relief in Federal court under the Civil Rights Act, even though they may not have exhausted all the administrative and judicial remedies made available by the State of California. *King* v. *Smith* (392 U.S. 309, 312 n. 4 (1968)); *Damico* v. *California* (389 U.S. 416 (1967)); *McNeese* v. *Board of Education* (373 U.S. 668 (1963)); *Monroe* v. *Pape* (365 U.S. 167, 180–183 (1961)).

16. It is the declared policy of the State of California, expressed through the State board of education, that:

> [P]ersons or agencies responsible for the establishment of school attendance centers or the assignment of pupils thereto shall exert all effort to prevent and eliminate racial and ethnic imbalance in pupil enrollment. The prevention and elimination of such imbalance shall be given high priority in all decisions relating to school sites, school attendance areas, and school attendance practices.

Title 5, California Administrative Code, section 14020.

17. When one or more schools in a school district is racially imbalanced with respect to one or more racial or ethnic groups—"imbalance" being defined as in finding 2—it is the responsibility of that school district under California law to consider alternative plans to reduce the imbalance, and to exert all effort to prevent and eliminate it. Title 5, California Administrative Code, sections 14020–14021.

18. Defendants have failed to comply with California law in that they have filed to adopt any of the alternatives suggested by various sources—for example, SRI, superintendent, human relations officer—which would have reduced the imbalance in the district's elementary schools, and have failed to exert substantial effort to reduce existing imbalances.

19. California law also requires a school district to consider the effects on the racial composition of schools caused by building or enlarging schools, and to exert all effort to prevent and eliminate racial imbalance. Title 5, California Administrative Code, sections 14020, 14021(a)(4).

26. Defendants have failed to comply with California law in that they have built new schools and enlarged old ones without considering the effect such construction would have on the racial composition of the schools. Id.

STANLEY A. WEIGEL,
U.S. District Judge.

DATED: JUNE 2, 1971

ORDER RE HEARING ON PLANS

In compliance with the court order of April 28, 1971, the plaintiffs and the defendants have each filed their respective plans for desegregation of the San Francisco public elementary schools. The court has made a preliminary study of them.

Each party will now have an opportunity to present its plan in open court. Arrangements for this were completed yesterday following the court's conference with counsel for all parties, including intervenors.

All have consented to the dates, times, and provisions for the hearings as hereinafter set forth. Each party, of course, has not thereby waived any substantive legal right.

On Thursday, June 24, 1971, starting at 10 a.m., the defendants will present and expound upon their plan, calling expert witnesses and consultants of their own choice in that interest. They will be allowed 2 hours of court time for this presentation. Thereafter, plaintiffs will be allowed 1 hour for cross-examination of the witnesses called by defendants. Following that, intervenors will have one-half hour for cross-examination, and defendants will then have, if they wish, one-half hour for rebuttal.

On Friday, June 25, 1971, starting at 10 a.m., the plaintiffs will present and expound upon their plan, calling expert witnesses and consultants of their own choice in that interest. They will be allowed 2 hours of court time for this presentation. Thereafter, defendants will be allowed 1 hour for cross-examination of the witnesses called by plaintiffs. Following that, intervenors will have one-half hour for cross-examination and plaintiffs will then have, if they wish, one-half hour for rebuttal.

At the foregoing court proceedings, the testimony will be that of experts and consultants who have prepared or studied the respective plans. In addition to a general exposition of the plan filed by their respective clients, counsel for the respective parties are requested to elicit testimony responsive to the following questions:

1. How and to what extent does the plan provide for desegregation?
2. How will the plan provide for the safety and convenience of those students who are to be transported?
3. What provision is or will be made under the plan so that all parents will be advised of details adequately in advance of the start of school on September 8, 1971?
4. What provisions have or will be made so that all parents will be in a position promptly to reach their children in case of emergency?
5. What has been the extent and nature of consultation with, or consideration of, the desires of parents and organizations with special interests based upon ethnic backgrounds, participation in PTA activities, development of plans or programs for improved educational practices, et cetera?
6. How does the plan deal with school construction programs so that they will not promote racial segregation either by enlargement of existing facilities or location of new ones or otherwise?
7. What are the provisions of the plan in regard to establishing hiring practices for teachers, administrators, and classified personnel in the interest of promoting racial balance in respective staffs, overall and at each school?
8. What provision does the plan make in the interest of promoting equalization of competence in teaching, administration, and services in all schools?
9. In what way does the plan insure that tracking systems and other educational techniques or innovations will not bring about racial segregation?

10. How does the plan meet the legitimate interests of schoolchildren who do not speak English or lack adequate proficiency in English?

11. Precisely what is the effect of the plan upon the Richmond complex and the projected Park-South complex?

12. What other features of the plan should be brought out as relevant and important?

The court will enter its judgment and decree after further study of the plans in the light of the foregoing presentations.

STANLEY A. WEIGEL,
U.S. District Judge.

DATED: JUNE 22, 1971.

MEMORANDUM OF DECISION, JUDGMENT, AND DECREE

GOVERNING LEGAL PRINCIPLES

More than 17 years ago, a unanimous decision of the U.S. Supreme Court made it clear that racial discrimination in public education violates the Constitution of the United States. Today it is established beyond all question that any law, ordinance, or regulation of any governmental agency (whether Federal, State, county, or city) requiring or furthering such discrimination violates the Constitution of the United States. The cases so holding are legion. They have been handed down, not only by the Supreme Court of the United States, but, as well, by other courts located throughout the Nation. A representative handful is set out in the margin.[1]

Therefore, those citizens or groups—the record indicates that there are some—who would promote or require racial discrimination in public education cannot have their way through court action. They must either bring about an amendment to the Constitution of the United States or undertake to violate it.

The law is settled that school authorities violate the constitutional rights of children by establishing school attendance boundary lines knowing that the result is to continue or increase substantial racial imbalance.[2] The law is settled that school authorities violate the Constitution by providing for the construction of new schools or enlargement of existing ones in a manner which continues or increases substantial racial imbalance.[3] The law is settled that school authorities violate the Constitution by assigning black teachers and teachers of limited experience to "black" schools while assigning few, if any, such teachers to "white" schools.[4]

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[1] Brown v. Board of Educ., 347 U.S. (1954); Brown v. Board of Educ., 349 U.S. 294 (1955); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961); *aff'd*, 368 U.S. 515 (1962); Goss v. Board of Educ., 377 U.S. 683 (1963); Griffin v. County School Bd., 377 U.S. 218 (1964); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala.), *aff'd* 389 U.S. 215 (1967); Green v. County School Bd., 391 U.S. 430 (1968); Poindexter v. Louisiana Financial Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968); Swann v. Charlotte-Mecklenburg Bd. of Educ., 39 U.S.L.W. 4437 (U.S. April 20, 1971); Clemons v. Board of Educ., 228 F. 2d 853 (6th Cir. 1956); Taylor v. Board of Educ., 294 F. 2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968); United States v. School District 151, 286 F. Supp. 786 (N.D. Ill.), *aff'd*, 404 F. 2d 1125 (7th Cir. 1968); Brewer v. City of Norfolk, 397 F. 2d 37 (4th Cir. 1968); Coppedge v. Franklin County Bd. of Educ., 273 F. Supp. 289 (E.D.N.C. 1967), *aff'd*, 394 F. 2d 410 (4th Cir. 1968); United States v. Board of Educ., 396 F. 2d 44 (5th Cir 1968); Board of Educ. v. Dowell, 375 F. 2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967); Davis v. School District, 309 F. Supp. 734 (E.D. Mich. 1970), *aff'd*, No. 20477 (6th Cir. May 28, 1971); Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970); Jackson v. Pasadena City School Dist., 59 Cal. 2d 876 (1963).

The evidence in this case makes it unquestionably clear that, as to the San Francisco elementary schools, the San Francisco school authorities have done all of these things persistently and over a period of years.[5]

It has been urged that the decisions forbid such practices only in those States (nearly all in the South) which, at an earlier time, had dual school systems. These contentions may possible have some peripheral historical and geographical validity; they have no validity whatever in law or equity. It is shocking, indeed, it is nonsensical, to assume that such practices are forbidden to school authorities in Florida or North Carolina, for example, but are permitted to school authorities in California. Neither the U.S. Supreme Court nor any other has drawn a Mason-Dixon line for constitutional enforcement. None has set up any such double standard of legality in constitutional interpretation.

Misconceptions of this kind may underlie contentions that the action of the San Francisco school authorities has not been de jure in character. It is now well settled law that any rule or regulation by school authorities which creates or continues or heightens racial segregation of schoolchildren is de jure. In legal terms, "de facto" is often used as an opposite of de jure. It is not difficult to illustrate the difference between the two. If a school board has drawn attendance lines so that there is a reasonable racial balance among the children attending a given school and if, thereafter, solely due to movement of the neighborhood population, the school attendance becomes racially imbalanced, the segregation thus arising is then de facto. On the other hand, if the school board, as in this case, has drawn school attendance lines, year after year, knowing that the lines maintain or heighten racial imbalance, the resulting segregation is de jure.[6]

No evidence whatever has been brought before the Court to show that, throughout the years since 1954 (when the U.S. Supreme Court held that racial segregation of children was an unconstitutional denial of equal educational opportunity), the San Francisco school authorities had ever changed any school attendance line for the purpose of reducing or eliminating racial imbalance.[7]

There is perhaps one more thing to be said regrading the term de jure. It need not be one stigmatizing school authorities. It does not imply criminal or evil intent. In the context of segregation, it means no more nor less that that the school authorities have exercised powers given them by law in a manner which creates or continues or increases substantial racial imbalance in the schools. It is this governmental action, regardless of the motivation for it, which violates the 14th amendment.[8]

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[2] See Appendix C, at 23.

[3] *Id.*, at 23–24.

[4] *Id.*, at 20.

[5] *See id.*

[6] *See id.*

[7] *See id.*

SOME PRACTICAL CONSIDERATIONS

It has been urged upon the Court that desegregation of the San Francisco elementary schools should be delayed to a time later than the commencement, on September 8, 1971, of the next full term of the San Francisco elementary schools. Even if delay were legally permissible, it would be undesirable. And it is not legally permissible. Where, as here, the constitutional rights of children to equality of educational opportunity are being denied, the law requires the promptest possible correction, overriding considerations of expediency such as cost and inconvenience. *Alexander* v. *Holmes County Board of Education* (396 U.S. 19 (1969)); *Carter* v. *West Feliciano Parish School Board* (396 U.S. 226 (1969)); *Keyes* v. *School District No. 1* (396 U.S. 1215) (Brennan, J.) (vacating stay). At the open-court hearings held concerning the respective plans submitted by plaintiffs and defendants, relevant testimony was given by experts employed by defendants. They declared, without qualification or contradiction by anyone, that it is feasible to put either plan into operation at the start of the school term this fall. Overall, the delay in integrating the San Francisco elementary schools has gone on far too long. It has gone on throughout the 17 years following the Supreme Court's proscription of segregated schools, notwithstanding the fact that the San Francisco school authorities had for many years known of the segregation, such knowledge having come, not only from citizen groups, but from one or more studies ordered and paid for by the San Francisco Unified School District itself.[9]

It has been repeatedly urged upon the Court that, since the racial population of San Francisco (and of its elementary school children) is more diverse than in other communities, racial segregation in the elementary schools ought to be permitted. The law allows no such latitude. And the facts make it ill advised.

While plaintiffs complain only of segregation of black students, the plan they have filed, as well as that filed by defendants, provides for a balancing of all races. The fact that the Court did not require more than desegregation of black students does not make the plans invalid. And there are solid reasons supporting the parties in their plans for desegregation of all races.

The multiplicity of racial backgrounds makes effective desegregation more, not less, important. All who testified on the subject were unanimous in pointing out that the evils of racism and ethnic intolerance are not limited to blacks and whites. Those who oppose desegregation, however well intentioned, would deprive children of the most meaningful opportunities to know members of different races. Opposition to desegregation fosters false concepts of racial superiority and of racial inferiority. And opposition to desegregation in the elementary schools is particularly ill advised. It works to prevent the kind of exchange in formative years which can best inoculate against racial hatred. Racial hatred is an adult rather than a childhood disease.

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[8] In the end, the whole *de facto* verus *de jure* debate may turn out to be insignificant. While the Supreme Court has not yet acted in cases of *de facto* segregation, there is compelling authority in decisions of lower courts requiring its elimination. *See* Barkdale v. Springfield School Comm., 237 F. Supp. 543 (D. Mass. 1965); Offerman v. Nitkowski, 248 F. Supp. 729 (W.D.N.Y. 1965), *aff'd*, 378 F.2d 25 (2d Cir. 1967); Jackson v. Pasadena City School Dist., 59 Cal. 2d 876 (1963).

[9] *See* Appendix C.

The law and the facts, then, in this case are at one in calling for desegregation of the San Francisco elementary schools.

The evidence demonstrates that there simply cannot be desegregation without some busing of some students because there are districts in the city in which there are great preponderances of members of one particular race. The evidence also dispels false rumors and other fallacies regarding busing. For example, the National Safety Council statistics, put in evidence, demonstrate that busing is by far the safest means of getting children to and from school. And whatever the real or asserted concerns of parents, the evidence is without dispute in showing that children enjoy busing.

The evidence further shows that the problem of getting parent and child together in emergency situations is not aggravated by busing. One reason is that many school authorities provide for one or more vehicles serving each school zone to be equipped with radios and to operate on a standby or cruising basis for such emergencies. The San Francisco school authorities, as stated in testimony on their behalf, will make such arrangements.

It should be noted, too, that the Supreme Court itself, speaking through Chief Justice Burger, recently pointed out (in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 39 U.S.L.W. 4437, 4446 (U.S. April 20, 1971)):

> ". . . Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. *Eighteen million of the nation's public school children, approximately 39 percent were transported to their schools by bus in 1969–70 in all parts of the country.* [Emphasis added.]

This is not to say that busing is a desirable end in itself. It is not. However, the law requires an elimination of the segregation in the San Francisco elementary schools which has so long persisted and has resulted in the fact that while only 28 percent of the total student population is black, 80 percent of the black children have been concentrated (by district attendance regulations) in 27 schools in which the black students constitute from 47 to 96 percent of the total student bodies. In 21 of those schools, the student bodies are over 71 percent black. Excessive racial imbalances such as this cannot be eliminated without transporting some schoolchildren. In any case, no useful purpose is served by the attempts of some to magnify the relatively small amount of busing which will be required in San Francisco.[10]

Finally in this connection, it should be noted that all of the hue and cry about busing, shown and reflected in the evidence, defeats salient purposes of many of those opposed to busing who say they fear a "white" flight from San Francisco. By feeding unwarranted fears about busing, those opposing desegregation invite a white flight even before children and parents have had a reasonable opportunity to see for themselves how busing works in actual practice. The testimony in this case makes it clear that in those communities in which busing has been employed, it has worked well. There was no evidence to the contrary.

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[10] In *Swann*, busing was ordered for a school district of 550 square miles. San Francisco is less than 50 miles square. The relative time and distance of busing is miniscule by comparison.

Chronology of This Case

To provide a convenient chronology of this proceeding and ready reference to prior orders of the court, the following may be noted.

1. Plaintiffs' suit was filed on June 24, 1969.
2. On August 25, 1970, after the submission of extensive written and oral testimony, all parties (including intervenors) submitted the case for the final decision.
3. The prior orders of this court relating to the merits of the case were the following:
    - A. Order Setting Aside Submission, dated September 22, 1970, copy attached hereto as appendix A.
    - B. Memorandum and Order Requiring the Parties To File Plans for School Desegregation, dated April 28, 1971, copy attached hereto as appendix B.
    - C. Supplementary Findings of Fact and Conclusions of Law, dated June 2, 1971, copy attached hereto as appendix C.
    - D. Order Re Hearing on Plans, dated June 22, 1971, copy attached hereto as Appendix D.

Concerning the Final Judgment and Decree

It will be noted that the court's judgment and decree, in effect, approves both the horseshoe plan submitted by the defendants and the freedom plan submitted by the plaintiffs. It is left to the choice of the school authorities to implement either one. Since the school authorities themselves submitted horseshoe, it is anticipated that they will elect to carry out that plan. Even so, there is utility in the approval of the freedom plan. If the school authorities find that, after sufficient actual operating experience, the zones established under horseshoe do not sufficiently eradicate racial imbalance or are excessively vulnerable to creation of serious imbalance by demographic change, they can turn to the readymade freedom plan with its provision for zones more closely in line with the racial balance of the total elementary school population.

There are a number of reasons why the court has not limited its approval to the freedom plan alone even though it does provide for closer racial balance.

While evidence of community sentiment or public feelings, however accurate, cannot be the measure of compliance with the law, if both plans do qualify under the law—and both do—it is hardly ill advised to permit implementation of that which the competent school authorities themselves have brought forward after extensive public hearings.

The full educational benefits of desegregation will not be had by the mere meeting of arithmetical percentages on racial balance. If desegregation is to provide maximum benefit, it is essential to have the good-willed, open-minded, and genuine cooperation of school administrators, teachers, other school personnel, parents, and the community at large. Therefore, while the court cannot relax legal requirements in the interest of satisfying an actual or assumed preponderance of community opinion, it may appropriately give reasonable weight to such a factor in considering two very different plans, both of which satisfy the legal requirements.

Modifications of horseshoe, filed with the court since the original plan was submitted on June 10, 1971, show a significant improvement in providing for racial balance. In transmitting the most recent modification, counsel for defendants assure the court "that any deviation from the 15 percent State guidelines would now occur—if at all—in no more than four or five schools and be something less than 2 percentage points" and "that the San Francisco Unified School District regards "horseshoe" as an evolving plan, and remodeling will continue through the summer with a view toward obtaining even further improvement in racial percentages." [11] Manifestly, remodeling and other changes can be made from time to time in the future in the interest of improving horseshoe in respect to racial balance as well as in other respects.

Horseshoe does call for less busing than the plan submitted by the plaintiffs. While, as noted earlier, busing is not, per se, a bad thing, neither is it desirable as an end in itself. Moreover, "horseshoe" is the more complete and detailed plan. This is not stated as a criticism of "freedom." Much of the information utilized in "horseshoe" was not available to plaintiffs. And "freedom" is a good plan.

At this point, a delineation of some of the effects of today's judgment and decree will be helpful to all concerned in avoiding misunderstanding.

1. It favors no race nor ethnic group. It has been fashioned so that benefits and burdens are shared equally by all.
2. Nothing whatever in it deemphasizes quality education. The plans approved actually provide for better education.
3. The judgment and decree does not require gifted children to be held back. They may be given special preferences or attention or handling in any manner which does not involve or promote racial segregation.
4. Bilingual classes are not proscribed. They may be provided in any manner which does not create, maintain, or foster segregation.
5. There is no prohibition of courses teaching the cultural background and heritages of various racial and ethnic groups. While such courses may have particular appeal to members of the particular racial or ethnic group whose background and heritage is being studied, it would seem to be highly desirable that this understanding be shared with those of other racial and ethnic backgrounds.
6. The decree does not preclude innovation nor experimentation nor creativity in educational practices. Indeed, the intent is to give school authorities maximum scope so long as they do not

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[11] Letter of transmittal dated July 2, 1971.

act to create, maintain or increase segregation or delay desegregation. Thus, while the law does not require socioeconomic balance in the student bodies of each school, the decree does not prevent school authorities from working to that end. Nor does it prevent their working to attempt to balance student bodies upon the basis of performance on standardized tests. Nor does it interfere with the Richmond complex or the projected Park South complex, both of which the court hereby expressly approves, subject only to those minimal changes, if any, necessary to comply with the decree. Nor does it preclude experimental schools under the supervision of special management arranged by contract. The foregoing and other educational practices working toward improvement in the quality of education are consistent with the judgment and decree so long as, to repeat, they neither create, maintain nor increase segregation nor delay desegregation.

7. The judgment and decree does command the school authorities carefully to provide for the physical safety and security of all students during their school attendance and bus transportation. It also requires that all parents be fully advised in advance about these matters.

8. The judgment and decree contemplates that desegregation will be carried out solely by the school authorities themselves. If they and all concerned act in good faith by complying with the law requiring desegregation, there will be no need for any further court action whatever.

The judgment and decree now to be entered is of less consequence than the spirit of community response. In the end, that response may well be decisive in determining whether San Francisco is to be divided into hostile racial camps, breeding greater violence in the streets, or is to become a more unified city demonstrating its historic capacity for diversity without disunity.

The schoolchildren of San Francisco can be counted upon to lead the way to unity. In this and in their capacity to accept change without anger, they deserve no less than the wholehearted support of all their elders.

FINAL JUDGMENT AND DECREE

Plaintiffs, parents of black children attending public elementary schools in the San Francisco Unified School District, having, on June 24, 1969, filed a complaint seeking desegregation of those schools; defendants, the San Francisco Unified School District, the individual members of the board of education thereof, and the superintendent of said district, having appeared and denied the substantive allegations of said complaint; 12 parents having been permitted to intervene on behalf of their respective Chinese, Japanese, Spanish surnames, and having appeared in opposition to plaintiffs; oral testimony offered by the original parties, as well as by intervenors, having been heard; voluminous documents having been introduced in evidence; all parties, including intervenors, having stipulated, on August 25, 1970, that the case was then submitted for final judgment and decree; plaintiffs and defendants having, on June 10, 1971, complied with a prior order by filing separate plans for desegregation of the elementary schools; special hearings having been held on June 24 and 25, 1971, on those plans; and the court being fully advised and having carefully considered the matter, it is hereby.

ORDERED, ADJUDGED, AND DECREED AS FOLLOWS

I

A. The preliminary findings of fact and conclusions of law, contained in the "Memorandum and Order Requiring the Parties to File Plans for School Desegregation", filed April 28, 1971 (copy attached hereto as appendix B), are hereby confirmed and incorporated herein by reference.

B. The "Supplementary Findings of Fact and Conclusions of Law", June 2, 1971 (copy attached hereto as appendix C), are hereby confirmed and incorporated herein by reference.

C. The additional facts stated in the foregoing memorandum of decision are hereby found by the court.

D. For a long period of time there has been and there now is de jure segregation in the San Francisco public elementary schools.

E. This segregation must be eradicated forthwith.

F. Subject to the further provisions of this judgment and decree, the court hereby approves the horseshoe plan submitted by defendants, a copy of which is attached hereto as appendix E.

G. Subject to the further provisions of this judgment and decree, the court hereby approves the freedom plan submitted by plaintiffs, a copy of which is attached hereto as appendix F.

II

Unless the context requires otherwise, the following words have the following respective meanings as used in this judgment and decree:

A. "District" means the San Francisco Unified School District, the board of education thereof, their respective and joint officers, agents and employees, including the superintendent of said district.

B. "Schools" means the public elementary schools of the district.

C. "Certificated personnel" means teachers and administrators.

D. "Classified personnel" means clerical, technical, unskilled, and other similar employees.

E. "Segregation" means, in reference to any group or class of persons, that the ratio of whites to blacks in that group or class is substantially at variance with the ratio of white children to black children in the total student population of the schools.

III

This judgment and decree is binding upon the district, its agents, officers, employees, and their successors, as well as upon all other persons who now or hereafter receive notice of this judgment and decree. No person shall directly or indirectly violate or attempt to violate or cause violation of any of its provisions.

IV

The district is directed and ordered:

A. To carry out, effective at the start of the next term of the schools on September 8, 1971, desegregation of the student bodies of each and all of the schools as provided for by the horseshoe plan (appendix E) or by the freedom plan (appendix F).

B. To carry out, diligently and promptly, all other provisions of the horseshoe plan or the freedom plan provided, however, that if any provision is in conflict with any provision of this final judgment and decree, the latter shall control.

C. To make bona fide, continuing and reasonable efforts, during the next 5 years, to eliminate segregation in each and every school.

D. To establish and carry out, diligently and promptly, practices for the hiring of certificated and classified personnel which will effectively eliminate segregation in the respective staffs, overall, and in each school.

E. To establish and carry out, diligently and promptly, practices for the assignment of certificated and classified personnel in a manner which will effectively eliminate segregation in the respective staffs, overall, and in each school.

F. To establish and carry out, diligently and promptly, practices for the assignment of certificated and classified personnel which will effectively promote equalization of competence in all schools.

G. To exercise, at all times, the highest degree of care for the safety and security of all schoolchildren at all times during their school attendance and transportation.

H. To provide, to the fullest extent feasible, racial and ethnic balance among students to be bused.

I. To inform all parents in writing, as soon as reasonably possible before the start of the school term this fall (1) of their children's school assignments and (2) of the details regarding bus transportation including, but not limited to, an outline of the safety measures which the district will utilize and of the procedures for enabling parents promptly to reach children in case of emergency.

J. To file with the court within 60 days after the end of each school year, until the court may otherwise order, a report showing in reasonable detail all actions taken to comply with this judgment and decree.

V

The district is permanently restrained and enjoined from:

A. Continuing, establishing, or furthering segregation in the schools as to pupils, certificated personnel, or classified personnel, any or all.

B. Authorizing, carrying out or permitting school construction programs which will create, maintain, or increase segregation, whether by enlargement of existing facilities or by location of new ones or otherwise.

C. Authorizing, carrying out or permitting hiring practices which will create, maintain, or increase segregattion among certificated or classified personnel, either or both.

D. Assigning certificated or classified personnel, either or both, in any way which will create, maintain, or increase segregation.

E. Authorizing, permitting, or using tracking systems or other educational techniques or innovations without effective provisions to avoid segregation.

F. Discriminating against any race or ethnic group in provisions for transportation of children.

G. Using testing devices, such as the national teachers examination or other methods of selection of personnel for employment, likely to result in the exclusion of qualified applicants because of race or ethnic backgrounds.

VI

The court does not now, but may hereafter, at any time, and from time to time, establish a panel or board to hear and resolve (subject to final approval by the court) any dispute which may arise in connection with the carrying out of this final judgment and decree or the court may provide for the referring of any such dispute for preliminary hearing before a master or Federal magistrate or the court may require other reasonable procedures in the interest of prompt, fair, and effective resolution of any such dispute.

VII

Plaintiffs' costs shall be taxed to defendant district. The court expressly reserves the power to determine, at a later date, whether or not the district shall reimburse plaintiffs for their reasonable attorney's fees and for reasonable fees and expenses incurred in obtaining experts to assist in the preparation of the plaintiffs' desegregation plan.

VIII

The court expressly retains complete and continuing jurisdiction to modify this final judgment and decree on its own motion or on the motion of any party. No person shall subvert any of its provisions by indirection or otherwise.

IX

This final judgment and decree is effective immediately. Testimony having established that timely compliance is feasible, and the court having carefully considered the respective rights of all parties and the interests of all affected, a stay of this final judgment and decree shall not be available from this court.

STANLEY A. WEIGEL,
U.S. District Judge.

DATED: JULY 9, 1971.

Part IV

STATE DESEGREGATION LAW CASES

SAN FRANCISCO UNIFIED SCHOOL DISTRICT *v.* JOHNSON

479 P.2d 669 (1971)

JANUARY 26, 1971

ACTION FOR MANDAMUS

Action in mandamus to compel school complex planning officer to execute requisition for computer study of present and proposed school assignments for pupils in complex. The supreme court, TOBRINER, Justice, held that statute providing that no governing board of school district shall require any student or pupil to be transported for any purpose or for any reason without written permission of parent or guardian does no more than prohibit school district from compelling students, without parental consent, to use means of transportation furnished by district and does not prohibit board from assigning student to particular school without parental consent, even if such assignment would involve busing, and thus statute does not violate any constitutional mandate.

Writ issued.

BURKE, *Justice*, filed concurring opinion in which WRIGHT, *Chief Justice*, and MCCOMB, *Justice*, concurred.

Irving G. Breyer, Jerome B. Falk, Jr., and William F. McCabe, San Francisco, *for petitioners*.

Newman, Robinson & Dunn, Alfred W. Newman, Vallejo, Kronick, Moskowitz, Teidemann & Girard, Adolph Moskowitz, Sacramento, Paul N. Halvonik, Charles C. Marson and Johnson & Stanton, San Francisco, *as amici curae on behalf of petitioners*.

Richard Harrington, San Francisco, *for respondent*.

Quentin L. Kopp, San Francisco, Vivian Hannawalt, San Rafael, Willis D. Hannawalt and Ngai Ho Hong, San Francisco, *as amici curiae on behalf of respondent*.

TOBRINER, *Justice*.

In this action for mandamus we are called upon to determine the interpretation and constitutionality of Education Code section 1009.5, which provides that "no governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian." We hold that section 1009.5 does no more than prohibit a school district from compelling students, without parental consent, to use means of transportation furnished by the district; so construed, section 1009.5 violates no constitutional mandate. We do not believe the section should be interpreted to prohibit the board from assigning a student to a particular school without parental consent, even if such assignment would involve busing.

We reach these conclusions by application of the principle that a statute which is reasonably susceptible of two constructions should be interpreted so as to render it constitutional. We shall point out that if section 1009.5 were read to limit the school board's authority over pupil assignment it would impinge upon constitutional principles.

More specifically, as we shall later explain in detail, a construction of section 1009.5, prohibiting nonconsensual pupil assignment, first, would involve the parents of schoolchildren in that assignment process, a State function, and would fail to foreclose conduct of parents designed to foster racial segregation. This interpretation would render the statute unconstitutional on its face in that, so interpreted, section 1009.5 would create a parental right to discriminate, interposing such a debilitory power upon the board in its effort to achieve integration. Second, the U.S. Supreme Court has held that school districts which maintain "de jure" segregated systems must eliminate such imbalance and establish unitary systems; yet the realization of that objective may very well require the reassignment of students without parental consent. Third, school boards, administering "de facto" segregated systems may bear an equivalent constitutional duty; in any event, to the extent that the statute involves the State in the preservation of such segregation, the legislation protects the very condition which the Constitution as interpreted by the U.S. Supreme Court, has condemned.

Nothing we say here should be considered to require the use of district transportation or busing for purposes of integration or for any other purpose. We are concerned only with the interpretation of a statute. If read in one way, that statute could be construed to prohibit nonconsensual busing in order to achieve racial integration; we point out that the section not only does not compel such a construction but also that any such interpretation would encounter constitutional difficulties.

In rejecting the construction that the statute strips a school board of the right to assign pupils to schools not within walking distance of their homes without parental consent, we do not assert that such assignment is in all instances constitutionally compelled. In some situations, however, it is the only practical and efficient method of achieving school integration. An enactment which by flat legislative fiat, prohibits any and all such assignments, exorcising a method that in many circumstances is the sole and exclusive means of eliminating racial segregation in the schools, necessarily legislates the preservation of racial imbalance. It therefore violates constitutional imperatives.

As of September 1969, San Francisco's elementary schools displayed serious racial imbalance.[1] In 1969, 28.7 percent of the children attending elementary school in San Francisco were black. Over 80 percent of the black children in grades 1 through 6 attended 27 of the 94 elementary schools. Over 70 percent attended schools in which the black children comprised more than half of the pupils. Ten schools were over 90 percent black; 27.6 percent of the black children attended those 10 schools. Projected population studies indicated that, without remedial action, racial imbalance would increase.[2]

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[1] See San Francisco Unified School District, Racial Estimates of Pupils Attending San Francisco Public Schools (1969). The figures in the text or computations by this court based upon this report.

In 1966 the San Francisco School District commissioned the Stanford Research Institute to recommend methods of desegregating city schools.[3] Based on the report of the institute, the board in 1969 resolved to establish two elementary school complexes, the Richmond complex and the Park South complex.[4] Each complex consists of a grouping of elementary schools, with some schools assigned to house kindergarten and grades 1 through 3, and others to house grades 4 through 6. A student living within the attendance zone for the complex is assigned to one of the schools in the complex, but in some instances this is not the school which the student previously attended, and not within reasonable walking distance of his residence. The district provides bus transportation, on a voluntary basis, for students living beyond reasonable walking distance of their school. The Richmond complex commenced operation in September of 1970; the Park South complex was tentatively scheduled for January 1971.

Education code section 1009.5 received the Governor's assent on September 14, 1970, and became effective as of November 23. The proposed Park South complex will not compel any student to ride on a school bus, but it does involve assignment of students to schools under circumstances such that the school bus is the most practical means of transportation. The plan, moreover, does not provide for solicitation of parental consent to pupil assignments; to require such solicitation, and to reassign pupils whose parents withheld such consent, would greatly increase the expense of administration and delay commencement of the complex. If a substantial number of parents of either the white or black races withheld consent, pupil reassignment to conform to parental wishes would defeat the educational objectives of the complex. The legality of the Park South complex thus turns on whether section 1009.5 applies to limit pupil assignments without parental consent and, if so interpreted, is constitutional.

In connection with the Park South complex the board found it necessary to obtain a computer study of the present and proposed school assignments for pupils in the complex. Respondent Donald Johnson, the complex planning officer, was requested to execute a requisition for this study; he refused to do so on the ground that the Park South complex did not contemplate parental consent to pupil assignments and thus was of doubtful legality under section 1009.5.

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[2] See Stanford Research Institute, Population Projection to 1971 (Research Memorandum No. 2 prepared for the San Francisco Unified School District, 1967).

[3] The parties have filed with the court copies of Stanford Research Institute Memoranda Nos. 2, 3, and 4, entitled, respectively, Population Projection to 1971, Dimensions of Equality of Educational Opportunity, and Educational Organization for Desegregation. These memoranda were filed with the board in March and April of 1967.

[4] Resolution 96-10A1, adopted June 10, 1969, and filed as exhibit "c" to the board's petition for mandamus.

The board thereupon filed the present action in mandamus to compel respondent to execute the requisition for the computer study.

I.—This Court Has Issued an Alternative Writ of Mandamus To Review the Validity and Interpretations of Section 1009.5

This court entertains original jurisdiction in mandamus under California constitution article VI, section 10, and rules of court, rule 56(a). We exercise such jurisdiction, however, only in cases in which "the issues presented are of great public importance and must be resolved promptly." (*County of Sacramento* v. *Hickman* (1967) 66 Cal. 2d 841, 845, 59 Cal. Rptr. 609, 611, 428 P. 2d 593, 595.) Exemplars of such instances are: *Perry* v. *Jordan* (1949 34 Cal. 2d 87, 90–91, 207 P. 2d 47 (qualification of initiative for ballot); *Farley* v. *Healey* (1967) 67 Cal. 2d 325, 326–327, 62 Cal. Rptr. 26, 431 P. 2d 650 (same); *County of Sacramento* v. *Hickman, supra* (validity of assessment procedures); *State Board of Equalization* v. *Watson* (1968) 68 Cal. 2d 307, 310–311, 66 Cal. Rptr. 377, 437 P. 2d 761 (same); and *Westbrook* v. *Mihaly* (1970) 2 Cal. 3d 765, 87 Cal. Rptr. 839, 471 P. 2d 487 (constitutionality of requiring two-thirds majority in bond elements).

Under these precedents, the present case plainly called for the exercise of the original jurisdiction of the court. The issues here presented respecting the interpretation and constitutionality of section 1009.5 are of great public concern and importance; their prompt resolution is essential to orderly planning and pupil assignment not only in San Francisco but throughout the State. The U.S. Supreme Court has directed that segregation in public schools must terminate "at once." (*Alexander* v. *Holmes Board of Education* (1969) 396 U.S. 19, 20, 90 S.Ct. 29, 24 L.Ed2d 19.) Since section 1009.5, under one interpretation, may delay desegregation, prompt judicial action is essential to comply with this direction. We therefore decided to issue the alternative writ of mandamus requested by petitioners; by so doing "we have necessarily determined that there is no adequate remedy in the ordinary course of law and that [this] case is a proper one for the exercise of our original jurisdiction." (*Westbrook* v. *Mihaly* (1970) 2 Cal. 3d 765, 773, 87 Cal. Rptr. 839, 844, 471 P. 2d 487, 492.)

II—Section 1009.5 Is Reasonably Susceptible of Two Interpretations

The ambiguity of section 1009.5 inheres in the phrase "require any student or pupil to be transported."[5] (Emphasis added.) One may require a student to be transported by punishing a refusal or by physically forcing him onto a school bus; in a second sense, one may require a student to be transported by assigning him to a school beyond walking distance of his home.

The sparse legislative history of section 1009.5 gives no aid in clarifying the section's amorphous proscription. As originally introduced, the legislation provided that "no governing board of a school district shall bus any student for the purpose of integration without the written permission of the parent or guardian."[6] In prohibiting busing for purposes of integration, while allowing busing for all other purposes, the original bill suggested a racial classification probably unconstitutional under *Hunter* v. *Erickson* (1969) 393 U.S. 385, 392–393, 89 S.Ct. 557, 21 L.Ed.2d 616.[7] Cognizant of this danger the Assembly amended the bill to its present form. The elimination of "shall bus any student" in the original bill and substitution of "shall require any student . . . to be transported" in the present enactment, however, does not relate to the problem of racial classification, and no explanation of the substitution has been offered. Neither the former language nor that of the present enactment, nor any committee reports or statements of legislators resolve the question whether the legislature intended section 1009.5 to limit the pupil assignment authority of school boards.

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[5] A less significant ambiguity arises from the word "transportation." All parties assume in their argument that section 1009.5 is directed at transportation in buses operated by the school district. Literally, however, "transportation" also encompasses travel by public conveyance or private car.

We turn first to the arguments advanced by respondent in favor of a construction which would apply section 1009.5 to pupil assignments. Respondent contends that the legislature enacted section 1009.5 for the purpose of granting parents an absolute right to prevent their children from being transported by school bus; the effective protection of this right, he contends, requires a construction of the statute which prevents school boards from assigning students to distant schools since, as a practical matter, the students may be compelled to ride school buses to get to those schools.

We agree with respondent that section 1009.5 confers upon the parent the right to reject compulsory busing and, instead, choose to transport his child by some other means more convenient to the parent and child. Respondent, however, assumes a further legislative intent to permit the parent to reject all modes of travel to a school except the walking of a "reasonable walking distance" from the child's home, thus permitting the parent effectively to reject an assignment of his child to a school beyond such distance and, in the absence of a school within such distance, to reject access to the educational system altogether. The meager legislative history of section 1009.5 does not offer sufficient evidence to support respondent's assumption.

Respondent also calls our attention to the State and national controversy over the reassignment of students from neighborhood schools to more distant schools for purposes of integration. It is this controversy, respondent argues, which impelled the legislature to enact section 1009.5, and thus, he contends, the section should be construed to express a legislative policy respecting pupil assignment. On the other hand, a requirement that students ride to school in buses instead of by other means of transportation, he urges, is a rare phenomenon unworthy of legislative attention or enactment.[8]

Many of the statutes dealing with the "busing" controversy, however, expressly and carefully distinguish between "busing" and pupil assignment. Section 209 of the Office of Education Appropriation Act, 1971, prohibits the use of Federal funds:

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[6] Assembly Bill No. 551, introduced February 5, 1970.

[7] Hunter v. Erickson (1969) 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 held unconstitutional an Akron, Ohio, city ordinance which required that all fair housing ordinances be submitted to popular referendum, but imposed no such condition upon other ordinances.

[8] We know of no instances in which school districts have required students to ride school buses in traveling to schools. The amicus brief of the California Teachers Association, however, states that "many districts often do require pupils to ride a bus to and from athletic events or while on study or field trips."

> . . . to force the busing of students; . . . or to force the transfer or assignment of any student attending an elementary or secondary school so desegregated to or from a particular school over the protest of his or her parents or parent.

(P.L. 91-380, tit. II, 9 U.S. Code Cong. Admin. News, pp. 3319-3320 (1970).[9] Section 401 of the Civil Rights Act of 1964 refers only to pupil assignment, declaring that:

> 'Desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance

(42 U.S.C. § 2000c); section 407(a) of that act refers only to transportation, stating that:

> . . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another . . .

(42 U.S.C. § 2000c-6.)

The North Carolina law presently before the U.S. Supreme Court provides that "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary busing of students in contravention of this article is prohibited. . . ." (N.C. Gen. Stat., § 115-176.1 (Supp. 1969): held unconstitutional in *Swann* v. *Charlotte-Mecklenburg Board of Education* (W.D.N.C. 1970) 312 F. Supp. 503, cert. granted Oct. 6, 1970.) [10]

We observe, thus, that section 1009.5 was enacted not only in a context of national concern over busing of pupils to integrate schools, but also in a context of both local and national measures which, in dealing with this matter, distinguish between assignment and transportation of pupils. The wording of section 1009.5 is limited to transportation. From this restriction we could infer that the legislature did not intend to deal with the entire subject of busing and integration, but only with the less controversial subtopic of involuntary busing. Moreover, as we shall discuss in detail later, an extension of section 1009.5 to apply to pupil assignments creates serious problems of constitutionality: the legislature may well have limited the language of section 1009.5 so as to avoid such difficulties.

In the California Education Code itself the term "transportation" appears frequently. Chapter 1 of division 13 of that code contains a comprehensive program, expressed in over 60 statutes, for the provision of school district transportation; article 10 of chapter 3 of division 14 provides for computation of allowances to school districts for transportation. In all these statutes the term "transportation" refers to the actual carriage of persons, or to payments in lieu of carriage.

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[9] Identical language appears in section 409 of the 1968 Appropriations Act. (See P.L. 90-557, tit. IV, 1 U.S. Code Cong. Admin.News, p. 1147 (1968).)

[10] A similar Alabama law was also held unconstitutional in Alabama v. United States (S.D.Ala.1970) 314 F.Supp. 1319.

None of the statutes modify or refer to the power of school boards to assign pupils.

We conclude that the context of the enactment of section 1009.5 does at least raise questions as to its meaning, leaving us with disturbing possibilities as to its ambiguous application. We turn, therefore, to the contention of petitioners that unless the section only prohibits the compulsory use of means of transportation, and does not restrict the authority of the board to assign pupils, it runs afoul of the Constitution, both on its face and in application.

III. Section 1009.5, if Construed to Require Parental Consent to the Assignment of a Pupil to a School Beyond a Reasonable Walking Distance From His Home, Would be Unconstitutional

The courts have long recognized the principle that if "the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution." (*County of Los Angeles* v. *Legg* (1936) 5 Cal. 2d 349, 353, 55 P.2d 206, 207; *People* v. *Davis* (1968) 68 Cal.2d 481, 483–484, 67 Cal.Rptr. 547, 439 P.2d 651.) Application of that principle to section 1009.5 compels us to interpret that statute to limit its prohibition to the requirement that pupils use means of transportation furnished by the school, and to avoid an extension of its compass to the right of school boards to assign pupils to schools.

The purpose of pupil assignment, obviously, in many cases is to achieve, or at least promote, racial integration in the school district. We shall explain how section 1009.5, if construed to permit parental veto of such pupil assignments, would violate constitutional mandate: first, in that it would impart a private parental decision into the State educational structure and transform that private decision, which could emanate from racial prejudice, into State action; second, in that it would prevent a school board from utilizing an effective principal means of remedying de jure segregation in the schools.

At the outset, we must analyze and reject the preliminary argument of respondent that pupil assignments for the purpose of integrating schools constitute an unconstitutional racial classification and that, accordingly, a parent, in refusing consent to such assignment, does no more than protect the constitutional right of his child.

A—THE ASSIGNMENT OF A PUPIL TO A SCHOOL BEYOND REASONABLE WALKING DISTANCE FROM HIS HOME FOR THE PURPOSE OF IMPROVING RACIAL BALANCE WITHIN THE SCHOOL DISTRICT DOES NOT DENY HIM THE EQUAL PROTECTION OF THE LAWS.

Our analysis begins with the classic ruling in *Brown* v. *Board of Education* (1954) 347 U.S. 483, 495, 74 S.Ct. 686, 692, 98 L.Ed. 873, that "separate educational facilities are inherently unequal." Evidence accumulated since 1954 has amply confirmed former Chief Justice Warren's declaration. The 1967 report of the United States Commission on Civil Rights, "Racial Isolation in the Public Schools," found that, all other factors equalized, Negroes in segregated schools have lower educational achievement than Negroes in integrated schools.

(Finding 8, p. 204.) The transfer of Negroes to integrated institutions, the commission noted, substantially betters their educational performance without harming the performance of white students. (See pp. 100–109.)

The commission offered the following explanation:

> The environment of schools with a substantial majority of Negro students . . . offers serious obstacles to learning. The schools are stigmatized as inferior in the community. The students often doubt their own worth, and their teachers frequently corroborate these doubts. The academic performance of their classmates is usually characterized by continuing difficulty. The children often have doubts about their chances of succeeding in a predominately white society and they typically are in school with other students who have similar doubts. They are in schools which, by virtue of both their racial and social class composition, are isolated from models of success in school. (p. 106.)

The commission went on to note that

> . . . racial isolation in the schools . . . fosters attitudes and behavior that perpetuate isolation in other important areas of American life. Negro adults who attend racially isolated schools are more likely to have developed attitudes that alienate them from whites. White adults with similarly isolated backgrounds tend to resist desegregation in many areas—housing, jobs, and schools." (p. 110.)

These findings of the commission do not, of course, turn on whether the segregation is of de facto or de jure character; it is the presence of racial isolation, not its legal underpinnings, that creates unequal education. (See *Jackson* v. *Pasadena City School District* (1963) 59 Cal.2d 876, 881, 31 Cal.Rptr. 606, 382 P.2d 878.) "Segregation, regardless of its cause, is a major factor in producing inferior schools and unequal educational opportunity." (*Keyes* v. *School District No. 1*, Denver, Colo. (D.Colo. 1970) 313 F.Supp. 61, 82.)

In *Brown* v. *Board of Education* (1954) 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L.Ed. 873, the Supreme Court observed that:

> Today, education is perhaps the most important function of State and local governments. . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms.

Unequal education, then, leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society. Integration of the public schools, presenting prospects of raising the level of educational achievement of blacks without harming that of whites, may serve to overcome this inequality of educational opportunity, and to make possible that acquaintance and companionship necessary to break down racial stereotypes and prevent racial prejudice. As stated in *Lee* v. *Nyquist* (W.D.N.Y. 1970) 318 F.Supp. 710,714,

> . . . it is by now well documented and widely recognized by educational authorities that the elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to all students, both black and white.

It would be ironic, indeed, if the 14th amendment, adopted to secure equality of citizenship for the Negro, prevented school boards from providing equality of education for the Negro.

Although the Supreme Court has not yet spoken to the issue,[11] the great majority of courts that have ruled upon it have firmly held that pupil assignment for the objective of racial integration does not violate the 14th amendment.[12] As stated by the fifth circuit in *United States* v. *Jefferson County Board of Education* (1966) 372 F.2d 836, 876:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetrated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose.

We recognize that racial classifications are constitutionally suspect;[13] in a society free of the perdition of past discrimination, the courts might well reject all attempts at racial classification. We seek, however, to provide for practical remedies for present discrimination, and to eradicate the effects of prior segregation; "at this point, and perhaps for a long time, true nondiscrimination may be attained, paradoxically, only by taking color into consideration." (*Youngblood* v. *Board of Instruction of Bay County, Fla.* (5th Cir. 1970), 430 F. 2d 625, 630.) We conclude that the racial classification involved in the effective integration of public schools, does not deny, but secures, the equal protection of the laws.

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[11] In United States v. Montgomery County Board of Education (1969) 395 U.S. 225, 232–235, 89 S.Ct. 1670, 23 L.Ed.2d 263, the Supreme Court approved a ratio plan for desegregation of teachers, without discussing the argument that such plans constitute unconstitutional racial classifications. The Georgia Supreme Court, in Barresi v. Browne (1970) 226 Ga. 456, 175 S.E.2d 649, 651–652, squarely held that an integration plan which involved pupil reassignment to achieve better racial balance was unconstitutional. The Supreme Court granted certiorari on October 6, 1970, and thus now has the opportunity to decide the validity of this argument.

[12] See, e g., Wanner v. County School Board of Arlington County (4th Cir. 1966) 357 F.2d 452, 454–455; (Dowell v. School Board of Oklahoma (W.D.Okl. 1965) 255 F.Supp. 971, 981; Swann v. Charlotte-Mecklenburg Board of Education (W.D.N.C.1970) 312 F.Supp. 503, 509–510, certiorari granted October 6, 1970; Norwalk CORE v. Norwalk Board of Education (D.Conn.1969) 298 F.Supp. 213; Offerman v. Nitkowski (W.D.N.Y. 1965) 248 F.Supp. 129; Booker v. Board of Education (1965) 45 N.J. 161, 212 A.2d 1; Addabbo v. Donovan (1965) 22 A.D.2d 383, 256 N.Y.S.2d 178, 183–184. Contra: Lynch v. Kenston School Dist. Board of Education (N.D.Ohio 1964) 229 F.Supp. 740, 744; Briggs v. Elliott (E.D.S.C. 1955) 132 F.Supp. 776; Barresi v. Browne (1970) 226 Ga. 456, 175 S.E.2d 649, 651–652, certiorari granted, October 6, 1970.

[13] Hunter v. Erickson (1969) 393 U.S. 385, 392, 89 S.Ct. 557, 21 L.Ed.2d 616; Bolling v. Sharpe (1954) 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884; see Loving v. Virginia (1967) 388 U.S. 1, 11, 87 S.Ct. 1817, 18 L.Ed.2d 1010.

B—SECTION 1009.5, IF CONSTRUED TO REQUIRE PARENTAL CONSENT TO THE ASSIGNMENT OF A PUPIL TO A SCHOOL BEYOND REASONABLE WALKING DISTANCE FROM HIS HOME, WOULD BE UNCONSTITUTIONAL ON ITS FACE IN THAT IT ENDOWS PARENTS WITH A VETO POWER OVER PUPIL ASSIGNMENTS SO THAT PARENTS CAN INJECT RACIAL DISCRIMINATION INTO THE CALIFORNIA EDUCATIONAL SYSTEM

Education, including the assignment of pupils to schools, is plainly a State function. (See *Brown* v. *Board of Education* (1954) 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873.)

> The education of the children of the State is an obligation which the State took over to itself by the adoption of the Constitution.

(*Piper* v. *Big Pine School District* (1924), 193 Cal. 664, 669, 226 p. 926, 928.) To carry out this responsibility the State has created local school districts, whose governing boards function as agents of the State. (*Hall* v. *City of Taft* (1956) 47 Cal.2d 177, 181, 302 P.2d 574; see *Becker* v. *Council of the City of Albany* (1941) 47 Cal. App. 2d 702, 705, 118 P.2d 924.) These local boards historically and traditionally have undertaken the assignment of pupils to individual schools within the district. In *Jackson* v. *Pasadena City School District* (1963) 59 Cal. 2d 876, 878, 31 Cal.Rptr. 606, 608, 382 P.2d 878, 880, we confirmed this authority, stating that:

> A local board of education has power, in the exercise of reasonable discretion, to establish school attendance zones within the district, to determine the area that a particular school shall serve, and to require the students in the area to attend that school.

(See Ed.Code. §§ 925, 1001, 1052; 29 Ops.Cal.Atty.Gen. 63 (1957).)

Section 1009.5, if applied to pupil assignments, would make the individual parents active participants in the pupil assignment process. Under such a construction, whenever the school board determined to assign a child to a school not within walking distance from his home, the board would be required to solicit parental consent. Presumably some parents would consent; others would not. The board must then reassign those children whose parents did not consent, reassign other children to make room for the first group, revise its transportation program to correspond to the reassignments, and again solicit parental consents. Such a procedure may very likely condemn the possibility of removing racial imbalance in the schools. In any case, this process incorporates the consent of the parents as an integral part of the pupil assignment process, and thus into the California educational system.

> It is obvious . . . that the general powers of the [school] board with respect to attendance zones are subject to the constitutional guaranties of equal protection and due process.

(*Jackson* v. *Pasadena City School District* (1963) 59 Cal.2d 876, 879, 31 Cal.Reptr. 606, 608, 382 P.2d 878, 880.)

> When private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

(*Evans* v. *Newton* (1966) 382 U.S. 296, 299, 86 S.Ct. 486 ,488, 15 L.Ed.2d 373.)[14] Consequently, the parental decision to grant or withhold consent to pupil assignment, as an integral part of the educational structure, is subject to the provisions of the 14th amendment. A system that bestows governmental force upon a private decision to impose racial discrimination cannot stand.

Although at this point we analyze the statute upon its face,

> a State enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective. . . . and for its ultimate effect.

(*Mulkey* v. *Reitman* (1966) 64 Cal.2d 529, 533–534, 50 Cal.Reptr. 881, 884, 413 P.2d 825, 828; See *Castro* v. *State of California* (1970) 2 Cal.3d 223, 229, 85 Cal.Rptr. 20, 466 P.2d 244; *Lee* v. *Nyquist* (W.D.N.Y.1970) 318 F.Supp. 710, 716.)[15] In the present case, we would be totally unrealistic to uphold section 1009.5 on an assumption that racial bias will play no role in the granting or withholding of parental consent. In view of the level of tension in the present society,[16] prejudices and objectives of racial separation will necessarily and significantly affect many parental decisions.

The net result is that section 1009.5, if it creates a parental power to refuse consent to pupil assignments, would beget a parental right to discriminate, and do so in a context of racial strife that would enable many to exploit that right to inflict racial prejudice. In the proposition 14 cases (*Mulkey* v. *Reitman* (1966) 64 Cal.2d 529, 50 Cal.Reptr. 881, 413 P.2d 825, and *Reitman* v. *Mulkey* (1967) 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830), an initiative measure gave an owner of real property "absolute discretion" to convey, or refuse to convey, the property to whomever he chose. We held that enactment unconstitutional, reasoning that "State authorization to discriminate was no less State action than State imposed discrimination." (64

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[14] See Burton v. Wilmington Parking Authority (1961) 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45; Terry v. Adams (1953) 345 U.S. 461, 489, 73 S.Ct. 809, 97 L.Ed. 1152; Smith v. Allwright (1944) 321 U.S. 649, 663–665, 64 S.Ct. 757, 88 L.Ed 987.

[15] In Hunter v. Erickson (1969) 393 U.S. 385, 391, 89 S.Ct. 557, 560, 21 L.Ed.2d 616, the Supreme Court held unconstitutional a city housing ordinance, stating that "although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority."

[16] See generally the Report of the National Advisory Commission on Civil Disorders [Kerner Commission] (1969); see, e.g., Alcorn v. Anbro Engineering, Inc. (1970) 2 Cal.3d 493, 498, fn. 4, 86 Cal.Rptr. 88, 468 P.2d 216.

Cal.2d at pp. 540–541, 50 Cal.Rptr. at p. 889, 413 P.2d at p. 833.) The U.S. Supreme Court affirmed our judgment, characterizing the provision as an unconstitutional attempt to create a "right to discriminate." (387 U.S. at p. 381, 87 S.Ct. 1627.)[17]

In the proposition 14 cases, dissenting opinions in this court and the U.S. Supreme Court argued that the 14th amendment applied only to State action, and that private decisions not to sell or lease property to a Negro lay beyond the scope of its prohibition.[18] No such argument can plausibly be raised in the present case. The assignment of pupils to various schools within a district has long been considered a State function; no one here contends to the contrary. If the State may not authorize private discrimination in the performance of a private function—and the proposition 14 cases so held—it is plain that it may not authorize its functionaries to impose unconstitutional discrimination upon the performance of a State function. Section 1009.5, if applied to pupil assignments, would in effect authorize parents, acting as State functionaries, to violate the 14th amendment. It would empower these private persons to inject the venom of racial discrimination into the veins of government. Such a statute would be unconstitutional on its face.

So interpreted, section 1009.5, as we shall now explain, likewise violates the Constitution in frustrating the extirpation of segregation in those school districts manifesting it.

C.—IF CONSTRUED TO REQUIRE PARENTAL CONSENT TO THE ASSIGNMENT OF A STUDENT TO A SCHOOL BEYOND REASONABLE WALKING DISTANCE FROM HIS HOME, SECTION 1009.5 WOULD BE UNCONSTITUTIONAL IF APPLIED TO DISTRICTS MANIFESTLY RACIAL SEGREGATION, WHETHER DE JURE OR DE FACTO IN CHARACTER

In eliminating a principal instrument of desegregation section 1009.5 would impede to that extent the elimination of racial segregation in the schools. Since the U.S. Supreme Court has held that de jure segregation must be eradicated root and branch, the section transgresses that ruling. Moreover, so far as the section preserves even de facto segregation, by affording governmental support to such segregation, it casts the State itself in the unhappy role of the savior of de jure segregation, and fails constitutionally.

For districts which contain de jure segregation the mandate of the U.S. Supreme Court is express: school boards in such districts are

> . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and

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[17] In Burton v. Wilmington Parking Authority (1961) 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45, a Delaware statute permitted a restaurateur to refuse to serve "persons whose reception or entertainment by him would be offensive to the major part of his customers." The majority found sufficient state involvement in the restaurant to render unconstitutional any exclusion of black customers. Justice Stewart, concurring, argued that the statute was unconstitutional on its face in that it gave the restaurateur and the majority of customers a right to discriminate on racial grounds. (365 U.S. at pp. 726–727, 81 S.Ct. 856, 862.)

[18] See Mulkey v. Reitman (1966) 64 Cal.2d 529, 545, 50 Cal.Rptr. 881, 413 P.2d 825 (dissenting opn. of White, J.); Reitman v. Mulkey (1967) 387 U.S. 369, 387, 87 S.Ct. 1627, 18 L.Ed.2d 830 (dissenting opn. of Harlan, J.)

> branch. . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.

(*Green* v. *County School Board of New Kent County* (1968) 391 U.S. 430, 437–439, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716.) Often the most effective program, and at times the only program, which will eliminate segregated schools requires pupil reassignment and busing.[19] Any enactment which obstructed a school board from carrying out its constitutional duty to eliminate segregation "root and branch," or compelled it to resort to less effective or ineffective means, would be plainly unconstitutional under the reasoning of *Green* v. *County School Board of New Kent County*, *supra.*

Closely on point is the decision of the three-judge federal court in *Swann* v. *Charlotte-Mecklenburg Board of Education* (W.D.N.C. 1970) 312 F.Supp. 503, probable jurisdiction noted October 6, 1970, which invalidated a North Carolina antibusing statute. The court held that:

> Busing may not be necessary to eliminate a dual system and establish a unitary one in a given case, but we think the Legislature went too far when it undertook to prohibit its use in all factual contexts. To say that busing shall not be resorted to unless unavoidable is a valid expression of State policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment—contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system.

(312 F.Supp. at p. 510.)

Since the U.S. Supreme Court has held that under the Constitution school boards in de jure segregated districts are "clearly charged with the affirmative duty to take whatever steps might be necessary" to eliminate segregation "root and branch," a statute which would proscribe a principal, and in some cases essential and exclusive step to achieve that end, must obviously violate constitutional requirements.

But amicus argues that the statute can be upheld with the exception of its possible application to de jure segregated districts. We do not believe, however, that the section can win piecemeal constitutionality. It is true that:

> We have recognized that a statute which has unconstitutional applications may nevertheless be effective in those instances where the Constitution is not offended."

(*Mulkey* v. *Retiman* (1966) 64 Cal.2d 529, 543, 50 Cal. Rptr. 881, 891, 413 P. 2d 825.) Yet, as we stated in *Franklin Life Ins. Co.* v. *State of*

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[19] See Swann v. Charlotte-Mecklenburg Board of Education (4th Cir. 1970) 431 F.2d 138, 145, and dissenting opinion of Judge Winter, 431 F.2d at p. 157, certiorari granted October 6, 1970; Kemp v. Beasley (8th Cir. 1970) 423 F.2d 851; United States v. Jefferson County Board of Education (5th Cir. 1966) 380 F.2d 385, 392; United States v. School Dist. 151 of Cook County, Illinois (7th Cir. 1968) 404 F.2d 1125, 1130; Keyes 1. School Dist. No. 1, Denver, Colorado (D.Colo.1970) 313 F.Supp. 90.

California (1965) 63 Cal. 2d 222, 227–228, 45 Cal. Rptr. 869, 404 P. 2d 477, and reiterated in *Mulkey* v. *Reitman*, supra.

> . . . when the application of the statute is invalid in certain situations we cannot enforce it in other situations if such enforcement entails the danger of an uncertain or vague future application of the statute . . . . We have been particularly aware of fomenting such danger of uncertainty in the application of a statute which would inhibit the exercise of a constitutional right.

If we were to hold section 1009.5 constitutional other than as applied to districts manifesting de jure segregation, we would risk such "danger of an uncertain or vague future application of the statute," for the definition of de jure segregation has not been settled, nor its perimeters ascertained, and a school board could not definitively determine whether or not section 1009.5 applied to its district. The courts have not drawn a clear distinction between de facto and de jure segregation.[20] Some courts have defined de facto segregation as that resulting from residential patterns in a nonracially motivated neighborhood school system.[21] These residential patterns, however, may be in part the product of unconstitutional enforcement of restrictive racial covenants.[22] While such residential paterns were developing, moreover, the school board was collaterally engaged in reaching decisions respecting pupil assignments, attendance zones, transportation, and the location of new facilities, which decisions in turn necessarily influenced the racial composition of the residential areas.[23] Often a board decision, although based upon neutral principles, foreseeably will and does lead to increased school segregation. The weighing of the motive and effect of board decisions stretching back for many years to arrive at a net determination of the de facto or de jure character of the present structure presents a highly difficult and possibly insoluble task.

As a consequence of the above factors, any effort to determine the extent of de jure segregation in California would encounter enormous difficulty.[24] A Federal district court has, indeed, found de jure segregation in the Pasadena School District. (*Spangler* v. *Pasadena City Board of Education* (C. D. Cal. 1970) 311 F. Supp. 501, 522–524; cf. *Jackson* v. *Pasadena City School District* (1963) 59 Cal.2d 876, 881, 31 Cal. Rptr. 606, 382, P. 2d 878.) Petitioners and respondents both treat the racial structure of San Francisco schools as exemplifying de facto segregation, but the amicus curiae brief of the American Civil Liberties Union contends that it is de jure segregation.[25] Most school districts in California have not attempted to determine the character of segregation within their bounds, and any such determination would necessarily turn upon the uncertain definition of that elusive concept.

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[20] The tvalidity of a distinction between de facto and de jure segregation is a much debated matter. That distinction has been utilized in United States v. School Dist. 151 of Cook County, Illinois (7th Cir. 1968) 404 F.2d 1125, 1130; United States v. Jefferson County Board of Education (5th Cir. 1966) 372 F.2d 836, 873, and the cases cited in footnote 26, *infra*, as holding that school districts have no duty to remedy de facto segregation. The distinction was rejected in Beckett v. School Board of City of Norfolk (E.D.Va.1969) 308 F.Supp. 1274, 1304–1305; Barksdale v. Springfield School Committee (D.Mass. 1965) 237 F.Supp. 543, 546; Fiss, Racial Imbalance in the Public Schools: the Constitutional Concepts, (1965) 78 Harv.L.Rev. 564, 584.

[21] United States v. Jefferson County Board of Education (5th Cir. 1967) 380 F.2d 385, 389, footnote 1; see Bell v. School City of Gary (6th Cir. 1963) 324 F.2d 209, 212–213; Keyes v. School Dist. No. 1, Denver, Colorado (D.Colo.1970) 313 F.Supp. 61, 73–75.

[22] See Swann v. Charlotte-Mecklenburg Board of Education (4th Cir. 1970) 431 F.2d 138, 141, certiorari granted October 6, 1970; Brewer v. School Board of City of Norfolk, Virginia (4th Cir. 1968) 397 F.2d 37, 41–42; Dowell v. School Board of Oklahoma City (W.D.Okl.1965) 244 F.Supp. 971, 976.

[23] See Spangler v. Pasadena City Board of Education (C.D.Cal.1970) 311 F.Supp. 501, 522–524; United States v. School Dist. 151 of Cook County, Illinois (N.D.Ill.1968) 286 F.Supp. 786.

Thus under the current pattern of court decisions, neither school districts nor lower courts can determine with any confidence whether a pattern of school segregation should be classed as de facto or de jure. Consequently, if we held section 1009.5 unconstitutional only as applied to districts of de jure segregation, no school board in California (with the possible exception of the Pasadent School Board) could ascertain whether section 1009.5 could constitutionally apply within its district. Such a holding would, therefore, entail uncertain enforcement of section 1009.5, a confusion which would inhibit and delay school boards in their efforts to bring about full equality of educational opportunity. The *Green* decision calls for desegregation now; a statute which imports confusion and delay in the uprooting of de jure segregation violates both the rule prohibiting partial enforcement of legislation, when such enforcement entails the danger of vague future application, and the mandate of the Supreme Court of the United States.

Turning to de facto segregation, we cannot uphold section 1009.5 to the extent that it lends governmental support to such segregation. We recognize that the courts of other jurisdictions have reached different decisions as to whether school boards bear an affirmative duty to eliminate de facto segregation. [26] This court, in ***Jackson*** v. ***Pasadena City School District*** (1963) 59 Cal. 2d 876, 31 Cal. Rpt. 606, 382, P. 2d 878, however, took a position squarely in favor of enforcing an affirmative duty to eradicate school segregation regardless of its cause. On page 881 of that opinion 31 Cal. Rtpr. on page 609, 382 P. 2d on page 881, then Chief Justice Gibson, forcefully stated:

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[24] We note that until 1947 California Education Code sections 8003 and 8004 permitted school boards to segregate Indians and Orientals, although not Negroes. See Mendez v. Westminister School Dist. (S.D.Cal.1946) 64 F.Supp. 544, 548.

[25] The de facto or de jure character of segregation in the San Francisco schools is currently the subject of litigation in the United States District Court for the Northern District of California (Johnson v. San Francisco Unified School District, Civ.No. 70–1331 SAW).

[26] The majority of cases reject the asserted affirmative duty to remedy de facto segregation; notable decisions are those of the Second Circuit (Offermann v. Nitkowski (1967) 378 F.2d 22, 24 (dictum); Sixth Circuit (Deal v. Cincinnati Board of Education (1966) 369 F.2d 55, 61–62); Seventh Circuit (Bell v. School City of Gary (1963) 324 F.2d 206, 212) and the Tenth Circuit (Board of Education v. Dowell (1967) 375 F.2d 158, 166 (dictum); Downs v. Board of Education (1964) 336 F.2d 988, 998.) Federal District Courts, however, have asserted this affirmative duty in the District of Columbia (Hobson v. Hansen (1967) 269 F.Supp. 401, 506–508; Massachusetts (Barksdale v. Springfield School Committee (1965) 237 F.Supp. 543, 546–547); Michigan (Davis v. School Dist. of Pontiac (E.D.Mich.1970) 309 F.Supp. 734, 744); and New York (Blocker v. Board of Education of Manhasset (E.D.N.Y.1964) 226 F.Supp. 208, 226–229; Branche v. Board of Education of Town of Hempstead (E.D.N.Y.1962) 204 F.Supp. 150, 153–154.)

> So long as large numbers of Negroes live in segregated areas, school authorities will be confronted with difficult problems in providing Negro children with the kind of education they are entitled to have. Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause.

We need not, however, for the purposes of this case, rely on the affirmative duty to desegregate set forth in *Jackson*. The unconstitutionality of section 1009.5, if applied to pupil assignments in districts of de facto segregation, is deeper, more flagrant, Section 1009.5 does not assume a neutral stance respecting de facto segregation of schools; it moulds a medium of obstruction to the elimination of that evil. It prohibits the use of a method that may be essential to desegregation: pupil assignment without the requirement of parental consent. Yet the State cannot constitutionally countenance obstructionism, for once the State undertakes to preserve de facto school segregation, or to hamper its removal, such State involvement transforms the setting into one of de jure segregation.[27]

In *Spangler* v. *Pasadena City Board of Education* (C.D. Cal. 1970) 311 F. Supp. 501, the court held that school board decisions designed to preserve segregation based on neighborhood patterns created a de jure segregated system; the school board, it asserted, cannot "build on residential segregation, when that segregation is the result of either private or State enforced discrimination." (311 F. Supp. at p. 522.) In *Keyes* v. *School Dist. No. 1, Denver, Colorado* (D. Colo. 1970) 313 F. Supp. 61, the school board rescinded resolutions which established a program to reduce de facto segregation. Although the court held de facto segregation constitutional, the action of the school board, undertaken with the objective of preserving that segregation, was held unconstitutional. (313 F. Supp. at pp. 66–69.) In the analogous field of housing discrimination *Reitman* v. *Mukey* (1966) 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830, although imposing no duty upon the State to end housing discrimination, held that an enactment barring such action was unconstitutional.

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[27] See Lee v. Nyquist (W.D.N.Y.1970) 318 F.Supp. 710, 719. See also United States v. Montgomery County Board of Education (1969) 395 U.S. 225, 235, 89 S.Ct. 1670, 1675, 23 L.Ed.2d 263, in which the Supreme Court, in approving a plan for desegregation of teachers, asserted that "in this field the way must always be left open for experimentation."

Pupil assignment to schools sufficiently distant to require bus transportation will often be the only effective device to eliminate de facto segregation.[28] The statute promulgates an absolute and irreversible prohibition of such assignments in the absence of parental approval. The statute erects this barrier without regard to the inequalities of the segregated schools, the educational advantages of integration, the ineffectiveness of alternative remedies, the cost of the program, or the desires of the majority of the students, parents, or the community. Hence, the State can hardly assert that its position is one of neutrality. By means of the statute, the State itself lends its awesome power to preserve the very segregation which the Constitution, as interpreted by the U.S. Supreme Court, has condemned.[29]

IV—Section 1009.5, Construed as a Constitutional Enactment, Does Not Render Unlawful the Proposed Pupil Assignment and Transportation Plan of the Park South Complex: Therefore, the Peremptory Writ of Mandate Should Issue

We have submitted that if interpreted to prohibit the nonconsensual assignment of a student to a school not within walking distance of his home, section 1009.5 runs afoul of constitutional stricture. A century of neglected reform has shown us that the virus of racial hatred endangers the health and unity of our society. We are now engaged in a great effort to rid us of that virus in every corner of our Nation. We know that racial animosity chiefly develops in the child who is reared in an environment that festers it. We would keep our schools free from its contamination; indeed, our Supreme Court has said that our constitutional obligation compels the immediate cleansing of every schoolroom where the law countenances its presence. How, then can we uphold as constitutional a statute that categorically bars a principal and sometimes exclusive antidote to the spread and growth of this ugly toxin—a statute that in striking down on major method of wiping out desegregation in the schoolroom, preserves and fosters and saves, to that extent, the segregation that this Nation has covenanted to end?

We have therefore concluded that section 1009.5 must be construed to avoid any limitation on the authority of school boards in the assignment of pupils to their respective schools; that the section limits only the power of school districts to compel students to utilize any particular mode of transportation without parental consent. As we observed earlier, the Park South complex does not envision any regulation compelling students within the complex area to ride schoolbuses, or use any particular method of traveling to school. Since the Park South complex thus presents no conflict with the provisions of section 1009.5, we conclude that the respondent was not justified in his refusal to proceed with computer programing needed to carry out that project.

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[28] On the Matter of Busing: A Staff Memorandum from the Center for Urban Education (Feb. 1970); United States Commission on Civil Rights (1967) Racial Isolation in the Public Schools, pages 196–197.

[29] An additional reason for construing section 1009.5 to avoid infringing upon the school board's power to assign students derives from the principle that whenever a statute is susceptible of two reasonable constructions, the courts should avoid that which creates serious inconvenience or impracticality. (See, e. g., City of El Monte v. City of Industry (1961) 188 Cal.App.2d 774, 782, 10 Cal.Rptr. 802; Reithardt v. Board of Education (1941) 43 Cal.App.2d 629, 633, 111 P.2d 440). The educational structure of California is not, and cannot be, so designed that every pupil is provided with a school within walking distance of his home. In rural areas almost all students travel by school bus; in urban regions the attendance zones of secondary schools often exceed a walking radius. Further, school boards often must assign students to schools outside their immediate neighborhood in order to relieve overcrowding in particular structures, or to facilitate repair or remodeling. Thus a construction of section 1009.5 which permitted a parent to demand that a child be assigned to a school within walking distance of his home would, in effect give the parents the right to demand impossible results. At the least, the efforts of school boards to accommodate such demands would create intolerable administrative expense and burden.

Let a peremptory writ of mandate issue as prayed.

PETERS, MOSK, and SULLIVAN, *Justices*, concur.

BURKE, *Justice* (concurring).

I concur in the judgment and in those portions of the majority opinion which hold that education code section 1009.5 does no more than prohibit a school district from compelling students, without parental consent, to use means of transportation furnished by the district. However, I do not believe that the section is reasonably susceptible of being construed as undertaking to prohibit the board from assigning a student to a particular school without parental consent. Accordingly, it seems to me that we should defer consideration of issues of constitutionality of a statute involving parental consent to pupil assignment until such time as we may be confronted with such a statute.

Chief Justice WRIGHT, and *Justice* MCCOMB, concur.

LEE *v.* NYQUIST

318 F.Supp. 710 (D. N.Y. 1970)

ARGUED, JUNE 26, 1970—DECIDED, SEPTEMBER 30, 1970

Before HAYS, *Circuit Judge*, HENDERSON, *Chief Judge*, and BURKE, *District Judge.*

COUNSEL FOR PARTIES

Herman Schwartz and David J. Mahoney, Jr., Buffalo, N.Y. (Jack Greenberg, New York, N.Y., Sylvia Drew, New York, N.Y., of counsel), *for Plaintiffs,*

Jean M. Coon, assistant attorney general of the State of New York (Louis J. Lefkowitz, attorney general of the State of New York, Ruth Kessler Toch, solicitor general of the State of New York, of counsel), *for defendants Ewald B. Nyquist and the Board of Regents of the State of New York,*

Anthony Manguso, corporation counsel of the City of Buffalo, and Herbert B. Forbes, assistant corporation counsel of the City of Buffalo, submitted a brief *for defendants Board of Education of the City of Buffalo and Joseph Manch, superintendent of the Board of Education of the City of Buffalo,*

Dennis M. Hurley, Brooklyn, N.Y. (John F. Haggerty, Hurley, Kearney & Lane, Brooklyn, N.Y., of counsel), *for defendants-intervenors,*

Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y., submitetd a brief amicus curiae *for the National Education Association of the United States, New York State Teachers Association, and Buffalo Teachers Federation,*

Burt Neuborne, New York Civil Liberties Union, New York, N.Y., submitted a brief amicus curiae for the plaintiffs in *Shepard, et al* v. *Board of Education of the City of New York, et al.*

HAYS, *Circuit Judge:*

The question in this case is whether section 3201(2) of the New York Education Law (McKinney 1970), enacted as chapter 342, [1969] Laws of New York 1306, denies "to any person . . . the equal protection of the laws" in violation of the 14th amendment of the Constitution of the United States.

Section 3201(2) of the New York Education Law provides as follows:

> 2. Except with the express approval of a board of education having jurisdiction, a majority of the members of such board having been elected, no student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of achieving equality in at-

> tendance or reduced attendance, at any school, of persons of one or more particular races, creeds, colors, or national origins: and no school district, school zone or attendance unit, by whatever name known, shall be established, reorganized or maintained for any such purpose, provided that nothing contained in this section shall prevent the assignment of a pupil in the manner requested or authorized by his parents or guardian, and further provided that nothing in this section shall be deemed to affect, in any way, the right of a religious or denominational educational institution to select its pupils exclusively or primarily from members of such religion or denomination or from giving preference to such selection to such members or to make such selection to its pupils as is calculated to promote the religious principle for which it is established.

Section 3201(2) prohibits State education officials and appointed school boards from assigning students, or establishing, reorganizing, or maintaining school districts, school zones, or attendance units for the purpose of achieving racial equality in attendance. By the terms of the statute, elected boards continue to have power to engage in such activities.

Plaintiffs, parents of children attending the Buffalo public schools, governed by an appointed school board,[1] brought this suit on behalf of themselves, their children, and all others similarly situated to enjoin the enforcement of section 3201(2) and to declare the statute unconstitutional on the ground that it denies equal protection of the laws. Plaintiffs' complaint is that section 3201(2) invidiously discriminates against efforts to eliminate racial imbalance in the public schools.

Defendants are the Board of Regents of the University of the State of New York, the commissioner of education of the State of New York, the superintendent of the Board of Education of the City of Buffalo and the Board of Education of the City of Buffalo. Intervening as defendants are other parents of children attending Buffalo public schools, who are opposed to the position advocated by the plaintiffs.

This three-judge court was convened to hear and determine this action, 28 U.S.C. 2284 (1964); see 28 U.S.C. 2281 (1964). We hold that section 3201(2) denies the equal protection of the laws guaranteed by the 14th amendment and that its enforcement must be permanently enjoined.

I

This court's jurisdiction to award the relief plaintiffs request is clear and is not questioned by defendants. See 42 U.S.C. 1983, 1988 (1964) and 28 U.S.C. 1343(3), 2201 (1964). Defendants, however, do contest plaintiffs' standing to bring the action; therefore, we turn first to that issue.

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[1] The Board is appointed by the Mayor of Buffalo, subject to confirmation by the city's Common Council. See N.Y. Education Law § 2553(3) (McKinney 1970). There are also appointed Boards of Education in New York City, Yonkers and Albany. See N.Y. Education Law § § 2253, 2590 (McKinney 1970). The statute provides that as of the first Tuesday in May, 1971, five members of the New York City Board shall be elected and two shall be appointed by the Mayor. N.Y. Education Law § 2590-b(1) (McKinney 1970).

In *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968), the Supreme Court said:

> [I]n terms of article III limitations on Federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.

This in turn depends upon whether the party seeking relief has

> . . . alleged such a person a stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." "*Baker* v. *Carr*, 369 U.S. 186, 204 (1962), *Flast* v. *Cohen*. supra at 99.

In resolving the issue. there are two inquiries to be made. First. whether there is a "logical nexus" between the status plaintiffs assert and the claim sought to be adjudicated,[2] *Flast* v. *Cohen*, supra at 102, and. second. whether plaintiffs are harmed in fact, economically or otherwise, by the law against which their complaint is directed. See *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152 (1970).

Plaintiffs clearly satisfy the "logical nexus" test. They are parents of children attending Buffalo public schools, suing on behalf of themselves, their children, and all others similarly situated.[3] Some of their children are in schools where there is a high degree of racial concentration.[4] Their complaint is that section 3201(2) invidiously discriminates against efforts to promote equal educational opportunity by alleviating racial imbalance in the public schools. Consequently there is a logical nexus both between plaintiffs' status and the legislation attacked and between their status and the constitutional infringement alleged. See *Flast* v. *Cohen*, supra at 102–03. Plaintiffs, for themselves and their children, are the logical parties to attack the constitutionality of a law directly affecting the State's educational policy. They are also proper parties to assert the right to be free from racial discrimination in public education. Their interest is both personal and direct. See *Adler* v. *Board of Education*, 342 U.S. 485, 503 (1952) (dissenting opinion of Frankfurter, J.). See *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

It is also clear that plaintiffs are harmed by section 3201(2). in that the educational policies to which their children are subjected are directly affected by the operation of the statute.

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[2] The Court's statement in *Association of Data Processing Service Organizations, Inc. v Camp*. 397 U.S. 150, 153 (1970), that the question of standing, apart from the case or controversy test, depends upon "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question," would appear to be an alternative formulation of the "logical nexus" test.

[3] Although plaintiffs failed to allege in their complaint that they are parents of children attending Buffalo public schools, this sufficiently appears from their affidavit in opposition to defendants' motion to dismiss. See Fed. R. Civ. P. 15(b).

[4] For instance, plaintiff Phyliss Johnson's child is in a junior high school 99.7% black; the children of Erwin Johnson (who is white) are in a school 95.6% white.

Although there may be no constitutional duty to undo de facto segregation, see *Offermann* v. *Nitkowski*, 378 F.2d 22, 24 (2d Cir. 1967), it is by now well documented and widely recognized by educational authorities that the elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to all students, both black and white.[5] The Regents of the University of the State of New York in their 1969 Restatement of Policy on Integration and the Schools said at p. 3:

> [T]he elimination of racial segregation in the schools can enhance the academic achievement of non-white children while maintaining achievement of white children and can effect positive changes in interracial understanding for all children. The latter consideration is paramount. If children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society. The stability of our social order depends, in large measure, on the understanding and respect which is derived from a common educational experience among diverse racial, social, and economic groups—integrated education. The attainment of integrated education is dependent upon the elimination of racial segregation in the schools.

Plaintiffs' complaint is that section 3201(2) impedes efforts to institute programs aimed at reducing racial imbalance in the schools. Defendants contend that plaintiffs lack standing to make this complaint since there is no showing that section 3201(2) has affected Buffalo's plans in this regard. It is clear, however, as Superintendent Manch's deposition indicates, that section 3201(2) severely inhibits the creation and siting of new middle schools and the adjustment of zone lines so as to achieve racial balance, as well as the use of other devices aimed at reducing racial segregation in the Buffalo public schools.[6] The statute denies appointed officials the power to implement nonvoluntary programs for the improvement of racial balance. Voluntary plans for achieving racial balance, however, have not had a significant impact on the problems of racial segregation in the Buffalo public schools; indeed, it would appear that racial isolation is actually increasing.[7]

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[5] See Integration and the Schools, A Restatement of Policy by the Regents of the University of the State of New York 4–6 (1969) and *Racial and Social Class Isolation in the Public Schools*. A Report to the Board of Regents of the University of the State of New York (1969), which contains an extensive bibliography on this point. Also see the authorities cited in *Hobson v Hansen*, 269 F. Supp. 401, 504–05 nn. 185–194 (D.D.C. 1967), aff'd sub nom. *Smuck v Hobson*, 408 F. 2d 175 (D.C. Cir. 1969).

[6] Past programs instituted by Buffalo in an effort to improve racial balance have included the following:

A voluntary open enrollment program under which 2,600 black children are bussed from inner city areas to the periphery.

The use of portable classrooms.

The creation of a new peripheral school, the West Hertle Middle School, into which 450 black children are bussed.

The redistricting of Bennett High School, which will result in a reduction in the percentage of black students in attendance from 37% to 32%.

Project Sit-Up at School No. 54, a program designed to stabilize the racial balance at a transitional school where white parents were gradually sending their children elsewhere and which has resulted in an increase in the white student population from 46% to 48% over a three year period.

The Buffalo Board of Education presently has under consideration a plan for the creation of twelve new middle schools sited so as to effectuate racial balance.

Under the circumstances, we need not await action by a State official in direct violation of the statute before considering the claim plaintiffs raise. The controversy is sufficiently crystallized. Cf. *Otey* v. *Common Council*, 281 F.Supp. 264, 274 (E.D. Wisc. 1968); *Holmes* v. *Leadbetter*, 294 F.Supp. 991 (E.D. Mich. 1968).

Defendants' contention that we should wait for a State court interpretation of the statute is also without merit. the statute is unambiguous on its face and clearly applies to all efforts to achieve racial balance, including such efforts by a school district subject to a preexisting order to eliminate segregation in its schools, as is Buffalo.[8]

Superintendent Manch has stated that Section 3201(2) puts all such plans in jeopardy. Defendants' contention that the plans for new middle schools are impeded only by the City Council's refusal to appropriate funds misses the point, since it is quite clear that any attempt by school officials to implement such plans would violate the statute. For instance, a plan similar to Project Sit-Up at School No. 54 could not be undertaken since it will no longer be possible to change existing school district boundaries so as to counter the effect of a shift in the racial composition of the community.

The following testimony is instructive in this regard:

By Mr. SCHWARTZ:

Q. Dr. Manch, have you and your office considered the impact of the second part of this Statute dealing with zoning and districting for the purpose of racial balance?

A. We have, and I can conceive there would be very, very great difficulty when we try to locate the new middle schools and assign pupils to them. In the case of the middle schools, we, of course, worked in conformity with the new law, and all of the children who attend that school had to get permission from their parents. We have [to have] signed statements permitting them to go and this would be a very difficult, time-consuming thing, and possibly frustrating activity, if we had to do this, in talking about six middle schools, if not more.

Q. Isn't it clear under the Statute, Doctor Manch, that you cannot set up even a district in a certain way if the purpose is to improve racial balance?

A. Yes, this is what it says.

Q. And isn't it clear also that your whole middle school program, which is designed to improve racial balance by siting them in certain places, and setting up certain attendance zones is jeopardized by Chapter 342?

A. Yes, as I said publicly, I think it is a bad law.

Q. Now, what will happen to racial isolation in Buffalo if you cannot do this kind of pupil assignment and zoning and districting and rezoning?

A. Obviously the racial isolation will get more severe. As I have indicated a number of times, if we are blocked in terms of this kind of legislative act from taking the steps that are open to us, removing children, since we cannot move buildings, we cannot make much more progress than we have, it seems to me.

Q. Isn't that even more so with respect to the fact that you cannot set up attendance zones?

A. Yes, it is.

Deposition of Superintendent Manch, at 29–30.

[7] Commissioner Nyquist reports that the number of schools in Buffalo in which the percentage of Negro students is 90% or more has increased from 20 in 1966 to 22 in 1969. See Answers to Interrogatories, Ewald B. Nyquist, Commissioner of Education of the State of New York, at 7.

Also see Board of Education, Buffalo, New York, Ethnic Census of the Buffalo Public Schools 1969–70.

[8] In 1965, Buffalo was ordered to devise and implement a feasible plan for eliminating racial imbalance in its schools. See *In the Matter of the Appeal of Yerby Dixon*, N.Y. Department of Education Decision No. 7470 (February 15,

Without the express approval of a local elected board or the consent of his parents. "*no student shall be assigned or compelled to attend* any school" and "no school district, school zone, or attendance unit, by whatever name known, *shall be established, reorganized, or maintained*" for that purpose. The Commissioner of Education has so interpreted the statute; see *Matter of Forbes*, 8 Ed. Dept. Rep. 195 (1969) ;[9] and defendants' arguments to the contrary involve interpretations of the statute too tortuous to warrant serious consideration.[10]

The Buffalo schools, governed by an appointed board, are directly affected by the operation of section 3201(2), and plaintiffs have standing to complain of its unconstitutionality. See *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 224 n. 9 (1963); *Zorach* v. *Clauson*, 343 U.S. 306, 309 n. 4 (1952); *McCollum* v. *Board of Education*. 333 U.S. 203, 206 (1948); *Smuck* v. *Hobson*, 408 F.2d 175, 178–179, 189 (D.C. Cir. 1969); Wright, Federal Courts section 13, at 42 n. 19 (2d ed. 1970).

II

Turning to the merits of plaintiffs' claim, we hold that section 3201(2), by invidiously discriminating against efforts to achieve racial balance, violates the equal protection clause of the 14th amendment.

. . . . Before the enactment of Section 3201(2), the Regents of the University of the State of New York were firmly committed to a policy of eradicating *de facto* segregation in New York's public schools,[11] and appointing educational officials were actively engaged in directing plans to improve racial balance.[12] The Regents' efforts met with considerable local resistance. . . .

> The purpose of [section 3201(2)] is to control the practice initiated by the Commissioner of Education in this State of assigning youngsters to public schools on the basis of race or color in order to achieve a certain racial balance or quota, with

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1965). The Commissioner of Education has made it clear that he can not, under the statute, direct or enforce pupil assignments or school district reorganization to promote racial balance in the Buffalo public schools which go beyond moves already ordered in the Yerby Dixon case. See Answers to Interrogatories at 5.

[9] The case defendants cite, *Board of Education* v. *Allen*. 32 A.D.2d 985, 301 N.Y.S.2d 764 (3d Dep't 1969), on remand, 60 Misc. 2d 926 304 N.C.S. 410 (Sup. Ct. 1969), is not authority to the contrary.

[10] For instance, defendants argue that Section 3201(2) does not prohibit orders by the Commissioner of Education directing local school boards to eliminate *de facto* segregation, but merely reserves to local elected boards the choice of the best means for achieving racial balance. Such an interpretation of the statute is untenable, for it is clear that the Commissioner would be unable to enforce such orders under the statute, and their issuance would be an exercise in futility.

This argument also ignores the fact that the statute prohibits local *appointed* boards from pursuing any nonvoluntary programs aimed at alleviating racial imbalance. Defendants, however, would avoid this problem by urging that the statute might be interpreted to apply only where the local board is elected, since *some* official must still have the authority to develop and implement plans for achieving racial balance at the local level. We reject this argument as frivolous, for we cannot believe the New York Legislature is so inept at stating its intentions.

[11] See, e.g., Integration and the Schools, A Restatement of Policy by the Regents of the University of the State of New York (1969).

[12] The history of these efforts by state and local officials is related in detail in *Racial and Social Class Isolation in the Public Schools*, A Report to the Board of Regents of the University of the State of New York, ch. 1 (1969).

> all of the waste, disruption, community upheaval, and expense which generally accompany such a move.
>
> * * * * *
>
> . . . [D]espite the mounting evidence of the failures of these [racial balancing] schemes, they have continued to be foisted upon unwilling communities by the Commissioner of Education. . . .
>
> * * * * *
>
> Gentlemen, I think . . . [this legislation is] . . . absolutely necessary if this legislature is ever going to put a halt to situations where a duly constituted elected board familiar with local conditions and sentiment is forced to implement a plan conceived in and mandated from Albany which, tragically, disrupts the stability and educational climate in the community. Perhaps none of your school districts have been zeroed in as yet, but a number of you probably have one or two districts in your area somewhere on the Commissioner's list.

New York State Senate Debate on assembly bill No. A214 of 1969, at 2454, 2459, and 2462–63.

The ultimate impact of section 3201(2) is equally clear. Racial isolation in the public schools of the State of New York is increasing. See "Racial and Social Class Isolation in the Public Schools, a Report to the Board of Regents of the University of the State of New York 8–11 (1969.)"[13] The problem is admittedly one generated in large part by local housing patterns and economic conditions. Yet affirmative efforts to reduce such segregation have been perceptively slowed by section 3201(2). The following statements by the Commissioner of Education, in answer to interrogatories propounded, are indicative of the effect which the statute will ultimately have:

> In every school district where racial imbalance exists there has been opposition to correction of such condition. Since [section 3201(2)] has deprived me of the power to order the correction of racial imbalance, only persuasion and financial assistance for implementation of proposals to correct racial imbalance have been possible. The city school districts of the cities of Mount Vernon and Newburgh have withdrawn applications for funds to be used for assisting in the elimination of racial imbalance. Other districts with racial imbalance problems have simply referred to [section 3201(2)] as the will of the State and have refused to take further action to solve such problems.
>
> [Section 3201(2)] will not itself tend to reduce benefits already gained, but will interfere substantially with further improvement because it prevents the board of education from assigning pupils without the consent of their parents. Because some parents will not consent to reassignment of their children for the purpose of correcting racial imbalance, significant progress in reducing such racial isolation is impossible.

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[13] Between 1967 and 1968 alone, the number of pupils in schools with a student population 89% or more non-white increased by 24 percent. *Racial and Social Class Isolation in the Public Schools*, supra at 103.

In sum, section 3201(2) is destined to bring to an end New York's strong, prointegration policy.

B. We need not, however, rest decision on *Reitman*. In *Hunter* v. *Erickson*, 393 U.S. 385 (1969), the Supreme Court said that it did not have to rely on *Reitman* since the law in issue involved an "explicitly racial classification." We believe that is precisely what is involved here.

In *Hunter*, the Court considered an amendment to the Akron city charter which prevented the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the prior approval of a majority of the voters of Akron. The Court found that the amendment, by drawing "a distinction between those groups seeking the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends," made it "substantially more difficult" to secure enactment of fair housing legislation and thus placed "special burdens on racial minorities within the governmental process." *Hunter* v. *Erickson*, supra at 390–91. The result, the Court found, was "an explicitly racial classification treating racial housing matters differently from other racial and housing matters." Id. at 389. Finding no compelling justification for such discrimination, the Court held that the amendment constituted an invidious denial of equal protection.

The principle of *Hunter* is that the State creates an "explicitly racial classification" whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.[14]

This is the effect of section 3201(2). The statute, by prohibiting the implementation of plans designed to alleviate racial imbalance in the schools except with the approval of a local elected board or upon parental consent, creates a single exception to the broad supervisory powers the State Commissioner of education exercises over local public education. (See *Vetere* v. *Allen*, 15 N.Y. 2d 259, 258 N.Y.S. 2d 77, cert. denied, 382 U.S. 825 (1965).) [15] With regard to all other matters affecting educational policy, the commissioner has the authority to order local boards to act in accordance with State educational policies as formulated by the board of regents. Parties considering themselves aggrieved by local board actions may seek to have the commissioner enforce those policies. (See N.Y. Education Law § § 207, 310 (McKinney's 1969).) Section 3201(2), however, singles out for different treatment all plans which have as their purpose the assignment of students in order to alleviate racial imbalance. The commissioner and local appointed officials are prohibited from acting in these matters only where racial criteria are involved. The statute thus creates a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools. We can conceive of no more compelling case for the application of the *Hunter* principle.

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[14] The force of this principle was foreshadowed in Mr. Justice White's separate opinion in *Evans* v. *Newton*, 382 U.S. 296, 306 (1966). In that case, the Court held that the mere appointment of private trustees to manage the racially segregated park created by testamentary disposition could not "disentangle" the park from the effects of state enforced segregation by the municipal regime previously controlling the park. Id. at 302. Mr. Justice White, however, would have remanded the case for further proceedings on the ground that the new private trustees could not in any event give effect to the racial conditions of the trust establishing the park, since the trust was incurably tainted by discriminatory state legislation favoring trust restrictions based on racial discrimination over trust restrictions for any other purpose. See id. at 306.

At least one commentator recognizes this principle as the true basis for the Court's decision in *Reitman* v. *Mulkey*, 387 U.S. 369 (1969):

> The rule which I would propose, then, as a basis for the *Reitman* decision, is that where a racial group is in a political duel with those who would explicitly discriminate against it as a racial group, and where the regulatory action the racial group wants is of full and undoubted federal constitutionality, the state may not place in the way of the racial minority's attaining its political goal any barriers which, within the state's political system taken as a whole, are especially difficult of surmounting, by comparison with those barriers that normally stand in the way of those who wish to use political processes to get what they want." Black, The Supreme Court 1966 Term-Foreward: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 82 (1967).

Defendants, however, argue that section 3201(2) does not constitute impermissible State involvement in racial discrimination, since in the absence of de jure segregation, the State is under no obligation to take affirmative action to reduce de facto segregation in the public schools and thus does not discriminate when it leaves such matter to a local elected board, so long as freedom of choice is preserved. Compare *Green* v. *County School Bd.*, 391 U.S. 430, 440–42 (1968) with *Deal* v. *Cincinnati Bd. of Education*, 369 F. 2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967), opinion on appeal after remand, 419 F. 2d 1387 (6th Cir. 1969). But the argument that the State has not discriminated because it has no constitutional obligation to end de facto racial imbalance fails to meet the issue under *Hunter* v. *Erickson*. The statute places burdens on the implementation of educational policies designed to deal with race on the local level. Indeed it completely prohibits the implementation of such policies where the local board is not elected. The discrimination is clearly based on race alone, and the distinction created in the political process, based on racial considerations, operates in practice as a racial classification. (See note, Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1080 (1969).)

Nor is there any compelling justification for the statutory classification. Racial classifications are "constitutionally suspect," *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954), bear a "heavy burden of justification," *Loving* v. *Virginia*, 388 U.S. 1, 9 (1967), and will be upheld only where "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964). (See *Hunter* v. *Erickson*, supra at 392.)

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[15] See N.Y. Education Law § 305 (McKinney 1969) which provides in part:

> The commissioner of education is hereby charged with the following powers and duties:
>
> 1. He is the chief executive officer of the state system of education and of the board of regents. He shall enforce all general and special laws relating to the educational system of the state and execute all educational policies determined upon by the board of regents.
>
> 2. He shall have general supervision over all schools and institutions which are subject to the provisions of this chapter, or of any statute relating to education, and shall cause the same to be examined and inspected, and shall advise and guide the school officers of all districts and cities of the state in relation to their duties and the general management of the schools under their control.

Defendants contend that the sole purpose of the statute was to give local boards, directly responsible to the people, control over the methods for achieving racial balance. The statute's salutary objective, they urge, was to assure the community acceptance necessary for the effectuation of local school desegregation. To the extent, however, that the statute thus recognizes and accedes to local racial hostility, the existence of which has created in the past a serious obstacle to the elimination of de facto segregation, the purpose is clearly an impermissible one. (See *Buchanan* v. *Warley*, 245 U.S. 60, 80–81 (1917); *Taylor* v. *Louisiana*, 370 U.S. 154 (1962) (per curiam).) In any event, defendants have failed to show that the purpose they impute to the statute could not be accomplished by alternative methods, not involving racial distinctions (See *Hunter* v. *Erickson*, supra at 392.)

In the final analysis the statute fails in justification because it structures the internal governmental process in a manner not founded on neutral principles. (See *Hunter* v. *Erickson*, supra at 393–94 (concurring opinion of Mr. Justice Harlan).) The New York Legislature has acted to make it more difficult for racial minorities to achieve goals that are in their interest. The statute thus operates to disadvantage a minority, a racial minority, in the political process. There can be no sufficient justification supporting the necessity of such a course of action. As the Court said in *Hunter* v. *Erickson*, supra at 392–93:

> [I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the 14th amendment . . . . Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.

We hold that section 3201(2) constitutes an explicit and invidious racial classification and denies equal protection of the law.

The statute is accordingly unconstitutional and its operation is permanently enjoined. A suitable order providing for injunctive relief in accordance with this opinion may be submitted on notice to defendants.

Plaintiffs' petition for an order awarding them counsel fees is denied.

PAUL R. HAYS.
U.S. Circuit Judge.
COLIN O. HENDERSON.
Chief Judge of the U.S. District Court for the Western District of New York.
HAROLD P. BURKE.
U.S. District Judge for the Western District of New York.

SEPTEMBER 30, 1970.

TOMETZ v. ILLINOIS BOARD OF EDUCATION

39 Ill. 593 (1969)

OPINION FILED—MAY 29, 1968

Appeal from the Circuit Court of Lake County; the Hon. Charles S. Parker, Judge, presiding.

Gerald C. Snyder, of Waukegan, John F. Grady and Richard J. Smith, of counsel, for *appellants.*

Alexander Polikoff, Charles R. Markels, and Ronald Silverman, all of Chicago, for *appellees.*

Mr. Justice WARD delivered the opinion of the court.

On June 13, 1963, the legislature approved an amendment to section 10-21.3 of the Illinois School Code relating to the duties of school boards. (Ill. Rev. Stat. 1967, chap. 122, par. 10-21.3.) This amendment, commonly called the Armstrong Act, provides in part:

> As soon as practicable, and from time to time thereafter, the board shall change or revise existing (attendance) units or create new units in a manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race, or nationality.

On August 4, 1965, the plaintiffs, seven children, by their respective parents, instituted a suit in the circuit court of Lake County claiming that the Waukegan City School District had violated the Armstrong Act and seeking a mandatory injunction requiring the district to revise the boundaries of its school attendance units. The district and the local board of education were named as defendants.

No boundary changes had been made in the school district since the enactment of the Armstrong Act. At the time suit was filed, the percentages of Caucasian and Negro students in each of the district's attendance units were as follows:

Name of school	Percentage of—	
	Caucasians	Negroes
Whittier	15	85
Clearview	100	0
Glen Flora	98	2
Glenwood	100	0
Hyde Park	100	0

After suit had been filed, Dr. McCall, who was then the superintendent of the defendant school district, was requested by the board to make a study of the Whittier and surrounding attendance units. Dr. McCall prepared a comprehensive report, which included four possible revisions of the boundaries for the school district area, which were designated plans 1, 2, 3, and 4. His observations concerning each plan's feasibility and desirability were part of the report. On June 13, 1966, the board considered the report, which, though it described possible boundary changes, recommended that no changes be made, and voted to make no revisions of attendance unit boundaries.

Trial was had on the plaintiffs' complaint and at its conclusion on July 20, 1966, the court found *inter alia* that the racial imbalance in the Whittier School area had not been created by any deliberate conduct on the part of the defendants and that the defendants had not been guilty of any intentional racial discrimination. Also, the trial court held that the Armstrong Act was constitutional and applicable to "so-called *de facto* segregation in schools, that is, racial imbalance in schools not created by the deliberate intent of a school board." The trial court judged that the defendants' failure to make any change in the boundaries of the district's attendance units was unreasonable under the circumstances and in violation of the Armstrong Act. The court, therefore, ordered the defendants to submit a plan making reasonable boundary revisions so as to "in some measure ameliorate the racial imbalance" in the attendance units concerned. August 4, 1966, was set for a hearing to consider the plan to be proposed.

On such date the trial court incorporated in its decree plan 2 of the McCall report with certain modifications. These modifications were proposed by Dr. Van Devander, the new school district superintendent, to improve the original plan 2 by avoiding certain traffic hazards and by more acceptably balancing class loads among the schools. Under the court's decree the distribution of Caucasian and Negro schoolchildren in the district was to be:

Name of school	Percentage of—	
	Caucasians	Negroes
Whittier	57.4	42.6
Clearview	100	0
Glen Flora	83	17
Glenwood	83.6	16.4
Hyde Park	79.9	20.1

In this direct appeal, the defendants challenge the constitutionality of the Armstrong Act, alleging that the act's requirement that race be considered as a factor in changing or forming school attendance unit boundaries, constitutes a racial classification condemned by the equal protection clause and due process clause of the 14th amendment to the U.S. Constitution and the due process clause of the Illinois constitution.

To support this claim, the defendants heavily rely on three Federal cases, each of which held, no State law being involved, that a local school board does not have an affirmative constitutional duty to act to alleviate racial imbalance in the schools that it did not cause. (*Deal* v. *Cincinnati Board of Education* (6th Cir. 1966) 369 F. 2d 55, cert. denied 389 U.S. 847, 19 L. E. 2d 114, 88 S. Ct 39; *Downs* v. *Board of Education of Kansas City* (10th Cir. 1964) 336 F. 2d 988, cert. denied 380 U.S. 914, 13 L. Ed. 2d 800, 85 S. Ct. 898; *Bell* v. *School City of Gray, Indiana* (7th Cir. 1963) 324 F. 2d 209, cert. denied 377 U.S. 924, 12 L. Ed. 2d 216, 84 S. Ct. 1223.) However, the question as to whether the Constitution requires a local school board, or a State, to act to undo de facto school segregation is simply not here concerned. The issue here is whether the Constitution permits, rather than prohibits, voluntary State action aimed toward reducing and eventually eliminating de facto school segregation.

State laws or administrative policies, directed toward the reduction and eventual elimination of de facto segregation of children in the schools and racial imbalance, have been approved by every high State court which has considered the issue. (Pennsylvania—*Pennsylvania Human Relations Com.* v. *Chester School District* (September 1967) 427 Pa. 157, 233 A. 2d 290; Massachusetts—*School Committee of Boston* v. *Board of Education* (June 1967) —— Mass. ——, 227 N. E. 2d 729, appeal dismissed (Jan. 15, 1968) —— U.S. ——, 19 L. Ed. 2d 788, 88 S. Ct. 692; New Jersey—*Booker* v. *Board of Education of Plainfield* (1965) 45 N.J. 161, 212 A. 2d I; *Morean* v. *Board of Education of Montclair* (1964) 42 N.J. 237, 200 A. 2d 97; California—*Jackson* v. *Pasadena City School District* (1963) 59 Cal. 2d 876, 382 P. 2d 878; New York—*Addabbo* v. *Donovan* (1965) 16 N.Y. 2d 619, 209 N.E. 2d 112, cert. denied 382 U.S. 905, 15 L. Ed. 2d 158, 86 S. Ct. 241; *Vetere* v. *Allen* (1965) 15 N.Y. 2d 259, 206 N.E. 2d 174; see also *Guida* v. *Board of Education of City of New Haven* (1965) 26 Conn. Sup. 121, 213 A. 2d 843.) Similarly, the Federal courts which have considered the issue, including *Deal* v. *Cincinnati Board of Education* (6th Cir.) 369 F. 2d 55, cert. denied 389 U.S. 847, 19 L. Ed. 2d 114, 88 S. Ct. 39, relied on by the defendants, have recognized that voluntary programs of local school authorities designed to alleviate de facto segregation and racial imbalance in the schools are not constitutionally forbidden. For example, *Offermann* v. *Nitkowski* (2d Cir. 1967) 378 F. 2d 22; *Deal* v. *Cincinnati Board of Education* (6th Cir. 1966) 369 F. 2d 55, 61, cert. denied 389 U.S. 847, 19 L. Ed. 2d 114, 88 S. Ct. 39; *Wanner* v. *County School Board of Arlington County* (4th Cir. 1966) 357 F. 2d 452, 455; *Springfield School Committee* v. *Barksdale* (1st Cir. 1965) 348 F. 2d 261; *Hobson* v. *Hansen* (D.D.C. 1967) 269 Fed. Supp. 401, 509, 510).

In *Springfield School Committee* v. *Barksdale* (1st Cir. 1965 348 F. 2d 261) the school authorities of Springfield, Mass., had passed a resolution to take appropriate action "to eliminate to the fullest extent possible (de facto) racial concentration in the schools within the framework of effective educational procedures." Addressing itself to this resolution, the Court of Appeals for the First Circuit stated at page 266 that:

> It has been suggested that classification by race is unlawful regardless of the worthiness of the objective. We do not agree. The defendants' proposed action does not concern race except insofar as race correlates with proven deprivation of educational opportunity. This evil satisfies whatever "heavier

> burden of justification" there may be compare *McLaughlin* v. *State of Florida* (1964, 379 U.S. 184, 194, 85 S. Ct. 283, 13 L. Ed. 2d 222). It would seem no more unconstitutional to take account plaintiffs' special characteristics and circumstances that have been found to be occasioned by their color than it would be to give special attention to physiological, psychological, or sociological variances from the norm occasioned by other factors. That these differences happen to be associated with a particular race is no reason for ignoring them. *Booker* v. *Board of Education* (1965, 45 N.J. 161, 212 A. 2d 1. . . .)

In *Morean* v. *Board of Education of Montclair* (1964) 42 N.J. 237, 200 A. 2d 97, the supreme court of New Jersey sustained the constitutionality of a school board's plan to assign students from a predominantly Negro junior high school to the town's three remaining junior high schools, even though race had been a consideration. The court stated there that:

> The motivation was, to avoid creating a situation at Hillside (school) which would deprive the pupils there of equal educational opportunities and subject them to the harmful consequences of practical segregation. Constitutional color blindness may be wholly apt when the frame of reference is an attack on official efforts toward segregation; it is not generally apt when the attack is on official efforts toward the avoidance of segregation.

200 A. 2d at 99; accord, *Offerman* v. *Nitkowski* ((2d Cir. 1967) 378 F. 2d 22, 24).

Also pertinent is the observation of the supreme court of Pennsylvania in *Pennsylvania Human Relations Com.* v. *Chester School District* (September 1967) (427 Pa. 157, 233 A. 2d 290). In this case, which involved de facto segregation in public schools, the court said:

> The school district does not suggest that it would be unconstitutional for the legislature to command them to consider race in their redistricting proposals in order to achieve a semblance of racial balance in its schools, nor do we believe there would be any merit in such a contention.

233 A. 2d at 294.

Too, the U.S. Supreme Court on January 15, 1968, dismissed an appeal in *School Committee of Boston* v. *Board of Education* ((Mass. 1967) 227 N.E. 2d 729), which challenged the statute providing for elimination of racial imbalance in public schools "for want of a substantial Federal question." —— U.S. ——, 19 L. Ed. 2d 778, 88 S. Ct. 692.)

The test of any legislative classification essentially is one of reasonableness. This court stated in *City of Chicago* v. *Vokes* (28 Ill. 2d 475), that neither the 14th amendment nor any provision of the Illinois constitution forbids legislative classifications reasonably calculated to promote or serve a proper police-power purpose.

> Rather, they invalidate only enactments that are arbitrary, unreasonble and unrelated to the public purpose sought to

> be attained, or those which, although reasonably designed to promote the public interest, effect classifications which have no reasonable basis and are therefore arbitrary.

(28 Ill. 2d at 479; see *Chicago Real Estate Board* v. *City of Chicago*, 36 Ill. 2d 530, 542, 543.) And, of course, the burden rests upon one assailing a statute or a classification in a law, to show that it does not rest upon any reasonable basis but is essentially arbitrary. *Thillens, Inc.* v. *Morey*, 11 (Ill. 2d 579, 591; *Stewart* v. *Brady*, 300 Ill. 425, 436.)

Here, the legislature has directed school boards "as soon as practicable" to fix or revise the boundaries of school attendance units in a manner that "takes into consideration" the prevention and elimination of segregation. We cannot say that the legislature acted arbitrarily and without a reasonable basis in so directing the school boards of this State.

The legislature is necessarily vested with board discretion to determine not only what the public interest and welfare require, but what measures are necessary to secure such interests. (*Thillens, Inc.* v. *Morey*, 11 Ill. 2d 579, 593; *People* v. *City of Chicago*, 413 Ill. 83, 91.) We have said.

> With the growth and development of the State, the police power necessarily develops, within reasonable bounds, to meet the changing conditions. The power is not circumscribed by precedent arising out of past conditions but is elastic and capable of expansion to keep up with human progress. It extends to the great public needs, that which is sanctioned by usage or held by prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. *City of Aurora* v. *Burns*, 319 Ill. 84.

(*People* v. *City of Chicago*, 413 Ill. 83, 91; accord, *Zelney* v. *Murphy*, 387 Ill. 492, 500.) Too, not to be disregarded is article VIII of the constitution which directs the general assembly to:

> . . . provide a thorough and efficient system of free schools, whereby all children of this State may receive a good common school education.

Ill. Const., art. VIII, sec. 1.

When, in *Brown* v. *Board of Education* ((1954) 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686), the Supreme Court declared unconstitutional de jure segregation in public schools, it made clear its position that all segregation of children solely on the basis of race deprives children of the minority group of equal educational opportunities. Though *Brown* directly concerned de jure segregation, segregation caused by official governmental action, courts since *Brown* have recognized that de facto segregation has a seriously limiting influence on educational opportunity. *Booker* v. *Board of Education of Plainfield*, ((1965) 45 N.J. 161, 212 A.2d I, 4, 5, 7; *Jackson* v. *Pasadena City School District*, ((1963) 59 Cal.2d 876, 382 P.2d 878, 881, 882); *Pennsylvania Human Relations Com.* v. *Chester School District* ((1967) 427 Pa. 157, 233 A.2d 290); *Springfield School Committee* v. *Barksdale*, ((D.C. Mass.) 237 F. Supp. 543, vacated on other grounds, 348 F.2d 261).

The fact that children other than Negro chilren may be deprived of equal educational opportunities does not form a constitutional impediment to the act concerned. The legislature is not required to choose between legislating against all evils of the same genus or not legislating at all. It may recognize degrees of harm, confining itself to where the need seems most acute. (*Chicago Real Estate Board* v. *City of Chicago* (36 Ill. 2d 530, 543–552); *Stewart* v. *Brady*, 300 Ill. 425, 436). Too, the Armstrong Act would apply to the offensive segregation of school children of any "color, race or nationality."

We deem that neither the 14th amendment nor any provision of the Illinois constitution deprives the legislature of the authority to require school boards "as soon as practicable" to fix or change the boundaries of school attendance units "in a manner which will take into consideration" the prevention and eventual elimination of segregation.

It is apparent from what we have said that our view is that the Armstrong Act was designed to apply to de facto school segregation. Illinois has never been classified as a de jure segregation State. School authorities in Illinois were forbidden from separating or excluding school children based on race or color as early as 1874 (*Chase* v. *Stephenson*, 71 Ill. 383; Hurd. Rev. Stat. 1874, chap. 122, par. 100 (now Ill. Rev. Stat. 1967, ch 122, par. 10–22.5); see also *People ex rel. Longress* v. *Board of Education of The City of Quincy*, (1882) 101 Ill. 308; *People ex rel Peair* v. *Board of Education of Upper Alton School Dist.*, 127 Ill. 613; *People ex rel. Bibb* v. *Mayor and Common Council of Alton*, 193 Ill. 309.) In 1954, the U.S. Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686), declared de jure school segregation by State action unconstitutional. Since then the unconstitutionality of de jure segregation has been clear. It would be unreasonable that our legislature, in 1963, in enacting the statute here concerned would be directing its attention superflously to de jure rather than de facto school segregation, as defendants maintain. (Accord: *Pennsylvania Human Relations Com.* v. *Chester School District* (1976) 427 Pa. 157, 233 A. 2d 290, 296.) We concur in the trial court's interpretation that the reference in the Armstrong Act to the "elimination of separation of children in the public schools because of color" is intended to apply to de facto segregation.

Too, the appellants question whether the Armstrong Act is so imprecise in defining a school board's duty as to be unconstitutional.

The act, revised section 10–21.3 of the Illinois School Code, (Ill. Rev. Stat. 1967, ch. 122, par. 10-21.3) does not refer to considerations traditionally relevant to the determination of school attendance unit boundaries such as classroom size, distances to school and traffic hazards. However, neither did the prior section 10–21.3 refer to these factors. It simply directed school boards then, as the present section does, to "establish one or more attendance units within the district." (Ill. Rev. Stat. 1961, chap. 122, par. 10–21.3, as originally enacted see 1951 Laws of Illinois, pp. 591, 593.) The omission, if it be considered such, does not invalidate the legislation.

> When it is necessary, the legislature may commit to others the responsibility for the accomplishment of the details of its expressed purpose. The scope of permissible delegation must be measured in terms of the complexity and diversity of the conditions which will be encountered in the enforcement of the statute.

(*Department of the Public Works and Buildings* v. *Lanter*, 413 Ill. 581, 589–90.) It is known that conditions certainly vary from school district to school district in Illinois and may vary within the same district. As we declared in a context resembling the present one:

> It would be both impossible and undesirable for the legislature to draft rigid nondiscretionary standards which would embrace each and every school district boundary change, for conditions surrounding the changes are seldom the same.

School Dist. No. 79 v. *School Trustee*, (4 Ill.2d 533, 537-538); accord, *Schreiber* v. *County Board of School Trustees*, ((1964) 31 Ill.2d 121, 126, 127).

We deem that the intention in the enactment was not to eliminate or minimize consideration by boards of factors traditionally weighed in setting school boundaries. Rather, the intent was to direct school boards in forming or changing school units to take into consideration color, race and nationality so that segregation of children on such basis would be prevented and, where appropriate, eliminated.

The Act does not designate when a school is to be considered racially segregated or imbalanced. However, this does not mean the Act lacks adequate specificity to be constitutional. (Accord: *Pennsylvania Human Relations Com.* v. *Chester School District*, (1967) 427 Pa. 157, 233 A. 2d 290, 301.) A statute need not always define each of its terms and detail each of its procedures.

> It is only where the legislative act is so indefinite and uncertain that courts are unable to determine what the legislature intended, or when the act is so incomplete or inconsistent that it cannot be executed, that the law will be invalidated by reason of indefiniteness or uncertainty.

(*People ex rel. Drobnick* v. *City of Waukegan*, 1 Ill.2d 456, 465; accord, *People ex rel. Christensen* v. *Board of Education*, 393 Ill. 345; *Husser* v. *Fouth*, 386 Ill. 188.) Here, the Act is capable of being executed. Terms such as "segregation" have a common and recognized meaning.

The act does not contain any definition of the words "race" or "color". A similar objection was presented to the court in *School Committee of Boston* v. *Board of Education*, ((1967) —— Mass. ——, 227 N.E.2d 729), where the Supreme Judicial Court of Massachusetts considered the constitutionality of a statute providing for the elimination of racial imbalance in public schools. The court cited its holding in *School Committee of New Bedford* v. *Commissioner of Education* ((1965) —— Mass. ——, 208 N.E.2d 814, 818) in dismissing the objection. In that case the court stated:

> The city contends that no adequate standards for classifying students as "white" and "nonwhite" are laid down in the request for a racial census. We recognize the difficulties which may arise in particular cases, particularly in communities with a heterogeneous population. These terms, however, seem to us reasonably susceptible of application by school superintendents and teachers for the present general purposes.

We do not believe that the criteria of race and color can present substantial difficulty to a board in making a racial census. Here, Dr.

McCall and the participating school personnel apparently encountered no problems in determining that the Glen Flora school was 98 percent Caucasian and the Whittier School 85 percent Negro. Also, as far as we can ascertain from cases dealing with problems of segregated schools, de facto or de jure, school authorities are not experiencing any significant difficulties in making color or race determinations of the type required by the act.

The defendants also argue that the trial court improperly overruled the school board, which had concluded, based on considerations of traffic hazards, walking distances, finances and classroom capacity, that existing attendance unit boundaries should not be revised.

As stated, the act provides that "as soon as practicable" a school board shall revise attendance unit boundaries "taking into consideration" the prevention and elimination of segregation. Here, a full hearing was conducted by the trial court at which the parties presented detailed evidence. At its conclusion, the trial court ruled inter alia that the defendants were in violation of the Armstrong Act and directed the alteration of school boundaries as described.

As the defendants state, the trial judge said that under the act racial imbalance is a paramount consideration in drawing school attendance unit boundaries. However, it is clear from the opinion of the trial judge that he considered and did not disregard other relevant factors in arriving at his decision. The trial judge stated:

> Defendants' evidence concerning traffic, distances of students from school, finances and classroom capacity are not determinative of the issues in the case at bar. In making this statement, the court does not mean to intimate that in a given case these factors could not be the determining factors and would override any factor of racial consideration. In a certain situation the court feels this could be true. However, in the instant case, the court is of the opinion that the evidence on these factors was not conclusive, and did not prove that a serious problem, or even one of very large proportions, existed in any of these categories: namely, traffic, distance, finance or classroom capacity.

Later the court observed:

> . . . in the case at hand, all of the attendance units involved are contiguous and in a general sense, constitute a neighborhood in the larger sense of the term. This is not an instance where units are separate, nor where any busing or transportation problems are involved.

The trial court found that no serious problems existed with references to the so-called traditional considerations and that such considerations were outweighed by the factor of racial imbalance in the attendance units concerned.

We are not prepared, following a review of the record, to declare that the holding of the trial court was manifestly against the weight of the evidence or clearly unreasonable.

Accordingly, the judgment of the circuit court of Lake County is affirmed.

Judgment affirmed.

Mr. Justice House, dissenting:

What is particularly disturbing about the Armstrong Act is the fact that school authorities are, for the first time in the history of this State, told to make decisions based upon race and nationality. The majority opinion holds that racial discrimination under the act is constitutionally permissible because it is for the benign purpose of equalizing the educational opportunity between Negroes and caucasians. I am of the opinion, however, that "the fundamental principle that racial discrimination in public education is unconstitutional" (*Brown* v. *Board of Education*, 349 U.S. 294, 99 L.Ed. 1083, 75 S.Ct. 753) prevents a State legislature or school board from deciding what is benign and what is not benign with respect to racial discrimination in public education.

The opening statements of the Supreme Court in *Brown* v. *Board of Education* (349 U.S. 294, 99 L.Ed. 1083, 75 S.Ct. 753 (*Brown* II)) were:

> These cases were decided on May 17, 1954. The opinions of that date [cited in footnote: *Brown* v. *Board of Education*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686; *Bolling* v. *Sharpe*, 347 U.S. 497, 98 L.Ed. 884, 74 S.Ct. 693] declaring *the fundamental principle that racial discrimination in public education is unconstitutional* [emphasis added], are incorporated herein by reference. All provisions of Federal, State, or local law requiring or permitting such discrimination must yield to this principle.

In the third paragraph of the opinion the court mentions:

> . . . a system of public education freed of racial discrimination [and] steps to eliminate racial discrimination in public schools.

Racial discrimination is, of course, the act of making distinctions based on race. A reading of *Brown II* indicates that the principle announced in *Brown I* is a neutral principle like the neutral principles of freedom of speech, freedom of the press, freedom of religion and freedom of assembly. Just as these principles prohibit Government from deciding what is benign or not benign with respect to speech, the press, religion or assembly, so the "fundamental principle that racial discrimination in public education is unconstitutional" prohibits Government from deciding when racial discrimination in public education is benign and when it is not.

The Armstrong Act has the effect of ordering school boards to enter the field of racial classification. In 1874, this court ruled that:

> The free schools of the State are public institutions, and in their management and control the law contemplates that they should be so managed that all children within the district . . . regardless of race or color, shall have equal and the same right to participate in the benefits to be derived therefrom. While the directors, very properly, have large and discretionary powers in regard to the management and control of schools, in order to increase their usefulness, they have no power to make class distinctions. . . .

(*Chase* v. *Stephenson*, 71 Ill. 383, 385; see also *People ex rel. Longress* v. *Board of Education of The City of Quincy*, 101 Ill. 308;

People ex rel. Peair v. *Board of Education of Upper Alton School Dist.*, 127 Ill. 613; *People ex rel. Bibb* v. *Mayor and Common Council of Alton*, 193 Ill. 309.) Later that same year, the legislature prohibited school officials from excluding any child on account of color. (Rev. Stat. 1874, chap. 122, par. 100.) Such a prohibition has always been in our school law and is now contained in section 10—22.5 of the school code. (Ill. Rev. Stat. 1965, chap. 122, par. 10—22.5.) Thus, from 1874 until the passage of the Armstrong Act there has been no doubt that school authorities in this State had no power to make class distinctions.

During this same period the 14th amendment has been construed as not prohibiting school authorities from making racial classifications (*Plessy* v. *Ferguson*, 163 U.S. 537, 41 L.Ed. 256, 16 S.Ct. 1138), and then as prohibiting school authorities from making racial classifications. (*Brown* v. *Board of Education*, 349 U.S. 294, 99 L.Ed. 1083, 75 S.Ct. 753). History paints a sorry picture for the period when school authorities were permitted to make decisions based on race. The very gist of *Plessy* v. *Ferguson* was that racial discrimination resulting in segregation was benign as long as the separate facilities were equal. Experience, of course, proved this proposition wrong.

Several States have again entered the field of racial classification in education albeit for what they now consider a proper governmental goal. As one commentator has pointed out:

> This is exactly what the plaintiffs' attorneys urged the Supreme Court to prohibit in the *Brown* case, and for good reason. Although today a court might rule that the State is required to consider race in a benign way, tomorrow this might well prove a precedent for a much less happy result. Moreover, even today it is not easy to decide whether a given racial classification is benign.

Kaplan, "Segregation Litigation and the Schools—Part II: The General Northern Problems," 58 N.W.U.L. Rev. 157, 188 (1963).

Unfortunately the battle for equal educational opportunity is being fought as a racial one. This tends to generate heat rather than light. Even the strongest exponents for elimination of racial imbalance in the schools recognize and admit that denial of equal education opportunity is not limited to the Negroes. (See e.g., Fiss, Racial Imbalance in the Public Schools; The Constitutional Concepts, 78 Harv. L. Rev. 564 (1963).) I believe that programs to create equal educational opportunities must, under the equal-protection clause of the 14th amendment (*Brown* v. *Board of Education*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686), and under section 22 of article IV of our constitution, be administered without regard to race. *Chase* v. *Stephenson*, 71 Ill. 383.

Several commentators have recognized the desirability of employing our traditional concept of general laws without regard to race to reach the problems of the disadvantaged in general, and Negroes in particular. For example, Professor Freund has stated:

> Is not the constitution color blind? Can a preferential treatment of Negroes be squared with the requirement of equal protection of the laws? Is it not an unconstitutional discrimination in reverse? A head on clash of principle can be averted, in most cases wisely in my judgment, by framing programs

> of aid in terms of reaching the most disadvantaged segment of the community, whether economically, or politically. And if these happen to be in fact predominantly Negroes, no principal of race-creed classification has been violated.

(Freund, Civil Rights and the Limits of Law, 14 Buffalo L.Rev. 199, 204 (1964).) The antipoverty programs of the Federal Government and our public aid programs are good examples of the point.

Assuming racial discrimination is not a neutral principle, it should be noted that in those few States where action against racially imbalanced schools has been sustained, it has been done on the ground that it was for equality of educational opportunity. For example, in *Vetere* v. *Allen* (15 N.Y. 2d 259, 206 N.E.2d 174), which involved a determination of the commissioner of education directing a school board to reorganize attendance areas in a school district, the court stated:

> Here the board of regents under authority of section 207 of the education law has declared racially imbalanced schools to be educationally inadequate. The commissioner under section 301 and 305 of the education law has implemented this policy by directing local boards to take steps to eliminate racial imbalance. These administrative decisions are final absent a showing of pure arbitrainess.

If the purpose of the Armstrong Act is to eliminate racial imbalance, it would appear to be for integration *qua* integration without any determination that it would promote equal educational opportunities. As the trial judge pointed out, the act does not mention factors such as traffic hazards, distance from home to school or overcrowding to be considered along with racial imbalance in fixing attendance unit lines. He concluded that elimination of racial imbalance is mandatory and the paramount consideration. Apparently the trial judge and the plaintiffs were aware that the legislature had not made a determination that elimination of racial imbalance will promote equal educational opportunities. Plaintiffs produced expert witnesses who testified that racial imbalance impairs educational opportunity and the trial judge made a finding that racial imbalance can result in educational disadvantage (not that it did in this case), a finding that would be unnecessary if the legislature had made it when passing the Armstrong Act. The difference, in short, is that New York approached the problem as an educational one whereas our legislature approached it as a social problem.

It was the trial court, and not the legislature, who attempted to tie the social aspect to the educational aspect. Where the legislature has passed an act which it deems socially desirable, the courts should not, as did the trial court here, determine that it will improve educational opportunity. This is a matter for the legislature. Aside from the fact that the trial court should not make a legislative determination, we note parenthetically that a strong argument can be made for the position that the action of a trial court in changing the attendance units may have an adverse effect on the goal of obtaining equal educational opportunities. See Kaplan, "Equal Justice in an Unequal World: Equality for the Negro—The problem of Special Treatment," (61 N.W. U. L. Rev. 363, 403 (1966)).

Finally assuming the legislature does have the power to vest school authorities with the power to change attendance units based on considerations of race and nationality, I believe it has done so without properly defining the terms under which the power is to be exercised.

The act tells school boards to eliminate the separation of children in public schools because of color, race or nationality. It was conceded by both parties that separation of children in the Waukegan District was not because of color or race. The trial judge avoided this difficulty by holding that separation . . . because of color, race or nationality was not to be taken literally as definitive of the origin of the separation but merely as descriptive of the condition of separation. Whether this construction is or is not correct, it demonstrates that the act by its ambiguous terms would apply one to de jure segregation which has never been permitted in this State.

Now assuming separation of children . . . because of color means elimination of racial imbalance regardless of its cause there is nothing to indicate what constitutes an improper racial imbalance. It is not surprising, of course, that racial imbalance is not defined because the act does not even use the term. The majority opinion glosses over this omission by the legislature by stating that segregation has a common and recognized meaning. In my reading of the cases and law review articles on this subject I have not come across this common and recognized meaning, and I doubt that the school authorities will find it unless the legislature or this court states it.

One author has defined de facto segregation in this manner:

> When the population of a community, or a public school system, is predominantly Negro, a school can be predominantly Negro and yet not be considered racially imbalanced. Moreover, a predominantly white school is not deemed racially imbalanced when the proportion of Negroes in the school substantially exceeds the proportion of Negro children in all of the public schools of the same grade level in the community. Although the proportion of Negroes in such a school may exceed the proportion of Negro children in all of the public schools of the same grade level, common usage does not apply the term "racially imbalanced" unless the school is also predominantly Negro, for only when a school is both predominantly Negro and literally imbalanced is it viewed as a segregated school.

Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, (78 Harv. L. Rev. 564, 565 (1963)).

Another author would define a segregated Negro school as one which is known within its community as a Negro school. (Sedler, School Segregation in North and West: Legal Aspects, 7 St. Louis U. L. J. 228, 257 (1963).) A 60 percent or 70 percent Negro school might be considered a Negro school in some communities and not in others.

Still another author in commenting on the percentage method for determining imbalance has observed:

> The plaintiffs in Gary, through their expert witness, argued that a school in a given community was segregated if its percentage of Negroes was more than one-third above or

> more than one-third below the percentage of Negroes in the community at large. The Urban League, however, defines a segregated school as one which is over 60 percent Negro.

Kaplan, Segregation Litigation and the Schools—Part II: The General Northern Problem, 58 N. W. U. L. Rev. 157, 181 (1963).

Again we have the trial judge and a majority of this court deciding what the legislature has not. The trial court found that the revised attendance units were permissible under the act, but there is nothing in the act upon which to base this conclusion.

Another uncertainty created by the act is its effect on the traditional and universally used neighborhood-school concept. The act directs school boards to change attendance units, taking into consideration the prevention of segregation, and elimination of separation of children of different color, race and nationality. The act does not mention considerations of room capacity, distance from home to school, traffic hazards or any other relevant factors. Whether racial imbalance is just one factor to be considered with these traditionally relevant factors, as in *Balaban* v. *Rubin*, 14 N.Y. 2d 193, 199 N.E. 2d 375); or whether it is the paramount consideration, as the trial judge held; or whether it is the only consideration, as the act indicates, creates a distinct uncertainty for school boards.

Again the majority opinion does what the legislature failed to do by stating:

> "We deem that the intention in the enactment was not to eliminate or minimize consideration by boards of factors traditionally weighed in setting school boundaries. Rather, the intent was to direct school boards in forming or changing school units to take into consideration color, race and nationality so that segregation of children on such basis would be prevented and, where appropriate, "eliminated."

I recognize the problem of trying to provide equal educational opportunities in the State, but the legislature cannot delegate its authority without properly defining the terms under which this authority is to be exercised. This court has on many occasions held that a law vesting discretionary power in an administrative officer without properly defining the terms under which his discretion is to be exercised is void as an unlawful delegation of legislative power. (*Krebs* v. *Thompson*, (387 Ill. 471); *Department of Finance* v. *Cohen*, (369 Ill. 510); *Chicagoland Agencies, Inc.* v. *Palmer*, (364 Ill. 13); *People* v. *Beckman & Co.*,) 347 Ill. 92). This rule applies with equal force to a delegation of power to school authorities. *Richards* v. *Board of Education*, (21 Ill.2d 104).

For the preceding reasons, I would hold the Armstrong Act unconstitutional.

Mr. Justice KLINGBIEL and Mr. Justice KLUCZYNSKI join in this dissent.

Part V

SCHOOL FINANCE CASES

SERRANO *v.* PRIEST

487 P.2d 1241 (1971)

FILED—AUGUST 30, 1971

JUDGMENT REVERSED

We are called upon to determine whether the California public school financing system, with its substantial dependence on local property taxes and resultant wide disparities in school revenue, violates the equal-protection clause of the 14th amendment. We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling State purpose necessitating the present method of financing. We have concluded, therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause.

SEE DISSENTING OPINION

Plaintiffs, who are Los Angeles County public schoolchildren and their parents, brought this class action for declaratory and injunctive relief against certain State and county officials charged with administering the financing of the California public school system. Plaintiff children claim to represent a class consisting of all public school pupils in California, "except children in that school district, the identity of which is presently known, which school district affords the greatest educational opportunity of all school districts within California." Plaintiff parents purport to represent a class of all parents who have children in the school system and who pay real property taxes in the county of their residence.

Defendants are the treasurer, the superintendent of public instruction, and the controller of the State of California, as well as the tax collector and treasurer, and the superintendent of schools of the county of Los Angeles. The county officials are sued both in their local capacities and as representatives of a class composed of the school superintendent, tax collector, and treasurer of each of the other counties in the State.

The complaint sets forth three causes of action. The first cause alleges in substance as follows: Plaintiff children attend public elementary and secondary schools located in specified school districts in Los Angeles County. This public school system is maintained throughout California by a financing plan or scheme which relies heavily on local property taxes and causes substantial disparities among individual school districts in the amount of revenue available per pupil for the districts' educational programs. Consequently, districts with smaller tax bases are not able to spend as much money per child for education as districts with larger assessed valuations.

It is alleged that "as a direct result of the financing scheme . . . substantial disparities in the quality and extent of availability of educational opportunities exist and are perpetuated among the several school districts of the State. . . . [Par.] The educational opportunities made available to children attending public schools in the districts, made available to children attending public schools in the districts, including plaintiff children, are substantially inferior to the educational opportunities made available to children attending public schools in many other districts of the State. . . ." The financing scheme thus fails to meet the requirements of the equal protection clause of the 14th amendment of the U.S. Constitution and the California constitution in several specified respects.[1]

In the second cause of action, plaintiff parents, after incorporating by reference all the allegations of the first cause, allege that as a direct result of the financing scheme they are required to pay a higher tax rate than taxpayers in many other school districts in order to obtain for their children the same or lesser educational opportunities afforded children in those other districts.

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[1] The complaint alleges that the financing scheme:

"A. Makes the quality of education for school age children in California, including Plaintiff children, a function of the wealth of the children's parents and neighbors, as measured by the tax base of the school district in which said children reside, and

"B. Makes the quality of education for school age children in California, including Plaintiff Children, a function of the geographical accident of the school district in which said children reside, and

"C. Fails to take account of any of the variety of educational needs of the several school districts (and of the children therein) of the State of California, and

"D. Provides students living in some school districts of the State with material advantages over students in other school districts in selecting and pursuing their educational goals, and

"E. Fails to provide children of substantially equal age, aptitude, motivation, and ability with substantially equal educational resources, and

"F. Perpetuates marked differences in the quality of educational services, equipment and other facilities which exist among the public school districts of the State as a result of the inequitable apportionment of State resources in past years.

"G. The use of the 'school district' as a unit for the differential allocation of educational funds bears no reasonable relation to the California legislative purpose of providing equal educational opportunity for all school children within the State.

"H. The part of the State financing scheme which permits each school district to retain and expand within that district all of the property tax collected within that district bears no reasonable relation to any educational objective or need.

"I. A disproportionate number of school children who are black children, children with Spanish surnames, children belonging to other minority groups reside in school districts in which a relatively inferior educational opportunity is provided."

In the third cause of action, after incorporating by reference all the allegations of the first two causes, all plaintiffs allege that an actual controversy has arisen and now exists between the parties as to the validity and constitutionality of the financing scheme under the 14th amendment of the U.S. Constitution and under the California constitution.

Plaintiffs pray for:

1. A declaration that the present financing system is unconstitutional;
2. An order directing defendants to reallocate school funds in order to remedy this invalidity; and
3. An adjudication that the trial court retain jurisdiction of the action so that it may restructure the system if defendants and the State legislature fail to act within a reasonable time.

All defendants filed general demurrers to the foregoing complaint asserting that none of the three claims stated facts sufficient to constitute a cause of action. The trial court sustained the demurrers with leave to amend. Upon plaintiffs' failure to amend, defendants' motion for dismissal was granted (Code Civ. Proc., § 581, subd. 3). An order of dismissal was entered (Code Civ. Proc., § 581d), and this appeal followed.

Preliminarily we observe that in our examination of the instant complaint, we are guided by the long settled rules for determining its sufficiency against a demurrer. We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law (*Daar* v. *Yellow Cab Co.* (1967) 67 Cal. 2d 695, 713). We also consider matters which may be judicially noticed (*Id.* at p. 716). Accordingly, from time to time herein we shall refer to relevant information which has been drawn to our attention either by the parties or by our independent research; in each instance we judicially notice this material since it is contained in publications of State officers or agencies (*Board of Education* v. *Watson* (1966) 63 Cal. 2d 829, 836, fn. 3; see Evid. Code, § 452, subd. (c)).

I

We begin our task by examining the California public school financing system which is the focal point of the complaint's allegations. At the threshold we find a fundamental statistic—over 90 percent of our public school funds derive from two basic sources:

a. Local district taxes on real property; and
b. Aid from the State school fund.[2]

By far the major source of school revenue is the local real property tax. Pursuant to article IX, section 6 of the California constitution, the legislature has authorized the governing body of each county, and city and county, to levy taxes on the real property within a school district at a rate necessary to meet the district's annual education budget (Ed. Code, § 20701, et seq.).[3] The amount of revenue which a district can raise in this manner thus depends largely on its tax base—that is, the assessed valuation of real property within its borders. Tax bases very widely throughout the State; in 1969–70, for example, the assessed valuation per unit of average daily attendance of elementary schools children[4] ranged from a low of $103 to a peak of $952,156—a ratio of nearly 1 to 10,000 (Legislative Analyst, Public School Finance, Part V, Current Issues in Educational Finance (1971) p. 7).[5]

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[2] California educational revenues for the fiscal year 1968–1969 came from the following sources: local property taxes, 55.7 percent; state aid, 35.5 percent; federal funds, 6.1 percent; miscellaneous sources, 2.7 percent. (Legislative Analyst, Public School Finance, Part I, Expenditures for Education (1970) p. 5. Hereafter referred to as Legislative Analyst.)

The other factor determining local school revenue is the rate of taxation within the district. Although the legislature has placed ceilings on permissible district tax rates (§ 20751, et seq.), these statutory maxima may be surpassed in a "tax override" election if a majority of the district's voters approve a higher rate (§ 20803 et seq.). Nearly all districts have voted to override the statutory limits. Thus the locally raised funds which constitute the largest portion of school revenue are primarily a function of the value of the realty within a particular school district, coupled with the willingness of the district's residents to tax themselves for education.

Most of the remaining school revenue comes from the State school fund pursuant to the "foundation program," through which the State undertakes to supplement local taxes in order to provide a "minimum amount of guaranteed support to all districts . . ." (§ 17300). With certain minor exceptions,[6] the foundation program ensures that each school district will receive annually, from State or local funds, $355 for each elementary school pupil (§§ 17656, 17660) and $488 for each high school student (§ 17665).

The State contribution is supplied in two principal forms. "Basic State aid" consists of a flat grant to each district of $125 per pupil per year, regardless of the relative wealth of the district. (California Constitution, art. IX, section 6, par. 4; Ed. Code, sections 17751, 17801.) "Equalization aid" is distributed in inverse proportion to the wealth of the district.

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[3] Hereafter, unless otherwise indicated, all section references are to the Education Code.

[4] Most school aid determinations are based not on total enrollment, but on "average daily attendance" (ADA), a figure computed by adding together the number of students actually present on each school day and dividing that total by the number of days school was taught. (§§ 11252, 11301, 11401.) In practice, ADA approximates 98 percent of total enrollment. (Legislative Analyst, Public School Finance Part IV, Glossary of Terms Most Often Used in School Finance (1971) p. 2.) When we refer herein to figures on a "per pupil" or "per child" basis, we mean per unit of ADA.

[5] Over the period November 1970 to January 1971 the legislative analyst provided to the Legislature a series of five reports which "deal with the current system of public school finance from kindergarten through the community college and are designed to provide a working knowledge of the system of school finance." (Legislative Analyst, Part I, *supra*, p. 1.) The series is as follows: Part I, Expenditures for Education: Part II, The State School Fund: Its Derivation and Distribution: Part III, The Foundation Program: Part IV, Glossary of Terms Most Often Used in School Finance; Part V, Current Issues in Educational Finance.

[6] Districts which maintain "unnecessary small schools" receive $10 per pupil less in foundation funds. (§ 17655.5 et seq.)

Certain types of school districts are eligible for "bonus" foundation funds. Elementary districts receive an additional $30 for each student in grades 1 through 3: this sum is intended to reduce class size in those grades. (§ 17674.) Unified school districts get an extra $20 per child in foundation support. (§§ 17671–17673.)

To compute the amount of equalization aid to which a district is entitled, the State superintendent of public instruction first determines how much local property tax revenue would be generated if the district were to levy a hypothetical tax at a rate of $1 on each $100 of assessed valuation in elementary school districts and $0.80 per $100 in high school districts.[7] (Section 17702.) To that figure, he adds the $125 per pupil basic aid grant. If the sum of those two amounts is less than the foundation program minimum for that district, the State contributes the difference. (Sections 17901, 17902.) Thus, equalization funds guarantee to the poorer districts a basic minimum revenue, while wealthier districts are ineligible for such assistance.

An additional State program of "supplemental aid" is available to subsidize particularly poor school districts which are willing to make an extra local tax effort. An elementary district with an assessed valuation of $12,500 or less per pupil may obtain up to $125 more for each child if it sets its local tax rate above a certain statutory level. A high school district whose assessed valuation does not exceed $24,500 per pupil is eligible for a supplement of up to $72 per child if its local tax is sufficiently high. (Sections 17920–17926.)[8]

Although equalization aid and supplemental aid temper the disparities which result from the vast variations in real property assessed valuation, wide differentials remain in the revenue available to individual districts and, consequently, in the level of educational expenditures.[9] For example, in Los Angeles County, where plaintiff children

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[7] This is simply a "computational" tax rate used to measure the relative wealth of the district for equalization purposes. It bears no relation to the tax rate actually set by the district in levying local real property taxes.

[8] Some further equalizing effect occurs through a special areawide foundation program in districts included in reorganization plans which were disapproved at an election. (§ 17680 et seq.) Under this program, the assessed valuation of all the individual districts in an area is pooled, and an actual tax is levied at a rate of $1 per $100 for elementary districts and $.80 for high school districts. The resulting revenue is distributed among the individual districts according to the ratio of each district's foundation level to the areawide total. Thus, poor districts effectively share in the higher tax bases of their wealthier neighbors. However, any district is still free to tax itself at a rate higher than $1 or $.80; such additional revenue is retained entirely by the taxing district.

[9] Statistics compiled by the legislative analyst show the following range of assessed valuations per pupil for the 1969–1970 school year:

	Elementary	High school
Low	$103	$11, 959
Median	19, 600	41, 300
High	952, 156	349, 093

(Legislative Analyst, Part V, *supra*, p. 7.)

Per pupil expenditures during that year also varied widely:

	Elementary	High school	Unified
Low	$407	$722	$612
Median	672	898	766
High	2, 586	1, 757	2, 414

attend school, the Baldwin Park Unified School District expended only $577.49 to educate each of its pupils in 1968–69; during the same year the Pasadena Unified School District spent $840.19 on every student; and the Beverly Hills Unified School District paid out $1,231.72 per child. (California Department of Education, California public schools, Selected Statistics 1968–69 (1970) table IV–11, pp. 90–91.) The source of these disparities is unmistakable: in Baldwin Park the assessed valuation per child totaled only $3,706; in Pasadena, assessed valuation was $13,706; while in Beverly Hills, the corresponding figure was $50,885—a ratio of 1-to-4-to-13. (Id.) Thus, the State grants are inadequate to offset the inequalities inherent in a financing system based on widely varying local tax bases.

Furthermore, basic aid, which constitutes about half of the State educational funds (Legislative Analyst, Public School Finance, pt. II, The State School Fund: Its Derivation, Distribution, and Apportionment (1970) p. 9), actually widens the gap between rich and poor districts. (See California Senate Fact Finding Committee on Revenue and Taxation, State and Local Fiscal Relationships in Public Education in California (1965) p. 19.) Such aid is distributed on a uniform per pupil basis to all districts, irrespective of a district's wealth. Beverly Hills, as well as Baldwin Park, receives $125 from the State for each of its students.

For Baldwin Park the basic grant is essentially meaningless. Under the foundation program the State must make up the difference between $355 per elementary child and $47.91, the amount of revenue per child which Baldwin Park could raise by levying a tax of $1 per $100 of assessed valuation. Although under present law, that difference is composed partly of basic aid and partly of equalization aid, if the basic aid grant did not exist, the district would still receive the same amount of State aid—all in equalizing funds.

For Beverly Hills, however, the $125 flat grant has real financial significance. Since a tax rate of $1 per $100 there would produce $870 per elementary student, Beverly Hills is far too rich to qualify for equalizing aid. Nevertheless, it still receives $125 per child from the State, thus enlarging the economic chasm between it and Baldwin Park. (See Coons, Clune & Sugarman, "Educational Opportunity: A Workable Constitutional Test for State Financial Structures" (1969) 57 Cal.L.Rev. 305, 315.)

II

Having outlined the basic framework of California school financing, we take up plaintiffs' legal claims. Preliminarily, we reject their contention that the school financing system violates article IX, section 5 of the California Constitution, which states, in pertinent part: "The legislature shall provide for *a system of common schools* by which a free school shall be kept up and supported in each district

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(*Id.* at p. 8.)

Similar spending disparities have been noted throughout the country, particularly when suburban communities and urban ghettos are compared. (See, e.g., Report of the National Advisory Commission on Civil Disorders (Bantam ed. 1968) pp. 434–436; U.S. Commission on Civil Rights, Racial Isolation in the Public Schools (1967) pp. 25–; Conant, Slums and Suburbs (1961) pp. 2–3; Levi, *The University, The Professions, and the Law* (1968) 56 Cal. L. Rev. 251, 258–259.)

at least 6 months in every year. . . ." [Italics added.] [10] Plaintiffs' argument is that the present financing method produces separate and distinct systems, each offering an educational program which varies with the relative wealth of the district's residents.

We have held that the word "system," as used in article IX, section 5, implies a "unity of purpose as well as an entirety of operation, and the direction to the legislature to provide 'a' system of common schools means one system which shall be applicable to all the common schools within the State." (*Kennedy* v. *Miller* (1893) 97 Cal. 429, 432.) However, we have never interpreted the constitutional provision to require equal school spending; we have ruled only that the educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade. (*Piper* v. *Big Pine School Dist.* (1924) 193 Cal. 664, 669, 673)

We think it would be erroneous to hold otherwise. While article IX, section 5, makes no reference to school financing, section 6 of that same article specifically authorizes the very element of the fiscal system of which plaintiffs complain. Section 6 states, in part:

> The legislature shall provide for the levying annually by the governing board of each county, and city and county, of such school district taxes, at rates . . . as will produce in each fiscal year such revenue for each school district as the governing board thereof shall determine is required. . . .

Elementary principles of construction dictate that where constitutional provisions can reasonably be construed to avoid a conflict, such an interpretation should be adopted. (*People* v. *Western Airlines, Inc.* (1954) 42 Cal. 2d 621, 637, app. dism. (1954) 348 U.S. 859.) This maxim suggests that section 5 should not be construed to apply to school financing; otherwise it would clash with section 6. If the two provisions were found irreconcilable, section 6 would prevail because it is more specific and was adopted more recently (*Id.; County of Placer* v. *Aetna Cas. etc. Co.* (1958) 50 Cal. 2d 182, 189.) Consequently, we must reject plaintiff's argument that the provision in section 5 for a "system of common schools" requires uniform educational expenditures.

III

Having disposed of these preliminary matters, we take up the chief contention underlying plaintiffs' complaint; namely, that the California public school financing scheme violates the equal protection clause of the 14th amendment to the U.S. Constitution.[11]

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[10] Plaintiffs' complaint does not specifically refer to article IX, section 5. Rather it alleges that the financing system "fails to meet minimum requirements of the * * * fundamental law and Constitution of the State of California," citing several other provisions of the state Constitution. Plaintiffs' first specific reference to article IX, section 5, is made in their brief on appeal. We treat plaintiffs' claim under this section as though it had been explicitly raised in their complaint.

[11] The complaint also alleges that the financing system violates article I, sections 11 and 21, of the California Constitution. Section 11 provides: "All laws of a general nature shall have a uniform operation." Section 21 states: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be

As recent decisions of this court have pointed out, the U.S. Supreme Court has employed a two-level test for measuring legislative classifications against the equal protection clause. "In the area of economic regulation, the High Court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. [Citations.]

"On the other hand, in cases involving 'suspect classifications' or touching on 'fundamental interests,' [fns. omitted] the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the State bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose." (*Westbrook* v. *Mihaly* (1970) 2 Cal. 3d 765, 784–785, vacated on other grounds (1971) — U.S. —; In re Antazo (1970) 3 Cal. 3d 100, 110–111; *Purdy & Fitzpatrick* v. *State of California* (1969) 71 Cal. 2d 566, 578-579.)

A—WEALTH AS A SUSPECT CLASSIFICATION

In recent years, the U.S. Supreme Court has demonstrated a marked antipathy toward legislative classifications which discriminate on the basis of certain "suspect" personal characteristics. One factor which has repeatedly come under the close scrutiny of the high court is wealth. "Lines drawn on the basis of wealth or property, like those of race [citation], are traditionally disfavored." (*Harper* v. *Virginia Bd. of Elections* (1966) 383 U.S. 663, 668.) Invalidating the Virginia poll tax in *Harper*, the Court stated:

> To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. (*Id.*) [A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth . . . [a] factor which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. [Citations.]

(*McDonald* v. *Board of Elections* (1969) 394 U.S. 802, 807.) (See also *Tate* v. *Short* (1971) 39 U.S. L. Week 4301; *Williams* v. *Illinois* (1970) 399 U.S. 235; *Roberts* v. *La Vallee* (1967) 389 U.S. 40; *Anders* v. *California* (1967) 386 U.S. 738; *Douglas* v. *California* (1963) 372 U.S. 353; *Smith* v. *Bennett* (1961) 365 U.S. 708; *Burns* v. *Ohio* (1959) 360 U.S. 252; *Griffin* v. *Illinois* (1956) 351 U.S. 12; In re *Antazo*, *supra*, 3 Cal. 3d 100; see generally, Michelman, "The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment" (1969) 83 Harv. L. Rev. 7, 19–33.)

Plaintiffs contend that the school financing system classifies on the basis of wealth. We find this proposition irrefutable. As we have already discussed, over half of all educational revenue is raised locally

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granted to all citizens." We have construed these provisions as "substantially the equivalent" of the equal protection clause of the Fourteenth Amendment to the federal Constitution (*Dept. of Mental Hygiene* v. *Kirchner* (1965) 62 Cal. 2d 586, 588.) Consequently, our analysis of plaintiffs' federal equal protection contention is also applicable to their claim under these state constitutional provisions.

by levying taxes on real property in the individual school districts. Above the foundation program minimum ($355 per elementary student and $488 per high school student), the wealth of a school district, as measured by its assessed valuation, is the major determinant of educational expenditures. Although the amount of money raised locally is also a function of the rate at which the residents of a district are willing to tax themselves, as a practical matter districts with small tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent districts reap with minimal tax efforts. (See fn. 15, infra, and accompanying text.) For example, Baldwin Park citizens, who paid a school tax of $5.48 per $100 of assessed valuation in 1968–69, were able to spend less than half as much on education as Beverly Hills residents, who were taxed only $2.38 per $100. (California Department of Education, op. cit. supra, table III-16, p. 43.)

Defendants vigorously dispute the proposition that the financing scheme discriminates on the basis of wealth. Their first argument is essentially this: through basic aid, the State distributes school funds equally to all pupils; through equalization aid, it distributes funds in a manner beneficial to the poor districts. However, State funds constitute only one part of the entire school fiscal system.[12] The foundation program partially alleviates the great disparities in local sources of revenue, but the system as a whole generates school revenue in proportion to the wealth of the individual district.[13]

Defendants also urge that neither assessed valuation per pupil nor expenditure per pupil is a reliable index of the wealth of a district or of its residents. The former figure is untrustworthy, they assert, because a district with a low total assessed valuation but a miniscule number of students will have a high per pupil tax base and thus appear wealthy. Defendants imply that the proper index of a district's wealth is the total assessed valuation of its property. We think defendants' contention misses the point. The only meaningful measure of a district's wealth in the present context is not the absolute value of its property, but the ratio of its resources to pupils, because it is the latter figure which determines how much the district can devote to educating each of its students.[14]

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[12] The other major portion is, of course, locally raised revenue; it is clear that such revenue is a part of the overall educational financing system. As we pointed out, *supra*, article IX, section 6 of the state Constitution specifically authorizes local districts to levy school taxes. Section 20701 et seq. of the Education Code details the mechanics of this process.

[13] Defendants ask us to follow Briggs v. Kerrigan (D. Mass. 1969) 307 F. Supp. 295, affd. (1st Cir. 1970) 431 F.2d 967, which held that the City of Boston did not violate the equal protection clause in failing to provide federally subsidized lunches at all of its schools. The court found that such lunches were offered only at schools which had kitchen and cooking facilities. As a result, in some cases the inexpensive meals were available to well-to-do children, but not to needy ones.

We do not find this decision relevant to the present action. Here, plaintiffs specifically allege that the allocation of school funds systematically provides greater educational opportunities to affluent childen than are afforded to the poor. By contrast, in *Briggs* the court found no wealth-oriented discrimination: "There is no pattern such that schools with lunch programs predominate in areas of relative wealth and schools without the program in areas of economic deprivation." (*Id.* at p. 302.)

Furthermore, the nature of the right involved in the two cases is very different. The instant action concerns the right to an education, which we have determined to be fundamental. (See *infra.*) Availability of an inexpensive school lunch can hardly be considered of such constitutional significance.

But, say defendants, the expenditure per child does not accurately reflect a district's wealth because that expenditure is partly determined by the district's tax rate. Thus, a district with a high total assessed valuation might levy a low school tax, and end up spending the same amount per pupil as a poorer district whose residents opt to pay higher taxes. This argument is also meritless. Obviously, the richer district is favored when it can provide the same educational quality for its children with less tax effort. Furthermore, as a statistical matter, the poorer districts are financially unable to raise their taxes high enough to match the educational offerings of wealthier districts. (Legislative analyst, part V, *supra*, pp. 8–9.) Thus, affluent districts can have their cake and eat it, too: They can provide a high quality education for their children while paying lower taxes.[15] Poor districts, by contrast, have no cake at all.

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[14] Gorman Elementary District in Los Angeles County, for example, has a total assessed valuation of $6,063,965, but only 41 students, yielding a per pupil tax base of $147,902. We find it significant that Gorman spent $1,378 per student on education in 1968–1969, even more than Beverly Hills. (Cal. Dept. of Ed., *op. cit. supra*, table IV–11, p. 90.)

We realize, of course, that a portion of the high per-pupil expenditure in a district like Gorman may be attributable to certain costs, like a principal's salary, which do not vary with the size of the school. On such expenses, small schools cannot achieve the economies of scale available to a larger district. To this extent, the high per-pupil spending in a small district may be a paper statistic, which is unrepresentative of significant differences in educational opportunities. On the other hand, certain economic "inefficiencies," such as a low pupil-teacher ratio, may have a positive educational impact. The extent to which high spending in such districts represents actual educational advantages is, of course, a matter of proof. (See fn. 16, *infra*.) (See generally *Hobson* v. *Hansen* (D.D.C. 1967), 269 F. Supp. 401, 437, affd. sub. nom. *Smuck* v. *Hobson* (D.C. Cir. 1969), 408 F. 2d 175.)

[15] "In some cases districts with low expenditure levels have correspondingly low tax rates. In many more cases, however, quite the opposite is true: districts with unusually low expenditures have unusually high tax rates owing to their limited tax base." (Legislative Analyst, Part V, *supra*, p. 8.) The following table demonstrates this relationship:

Comparison of selected tax rates and expenditure levels in selected counties, 1968–69

	ADA	Assessed value per ADA	Tax rate	Expenditure per ADA
Alameda:				
Emery Unified	586	$100, 187	$2. 57	$2, 223
Newark Unified	8, 638	6, 048	5. 65	616
Fresno:				
Coalinga Unified	2, 640	33, 244	2. 17	963
Clovis Unified	8, 144	6, 480	4. 28	565
Kern:				
Rio Bravo Elementary	121	136, 271	1. 05	1, 545
Lamont Elementary	1, 847	5, 971	3. 06	533
Los Angeles:				
Beverly Hills Unified	5, 542	50, 885	2. 38	1, 232
Baldwin Park Unified	13, 108	3, 706	5. 48	577

(Id., at p. 9.)

This fact has received comment in reports by several California governmental units. "[S]ome school districts are able to provide a high-expenditure school

Finally, defendants suggest that the wealth of a school district does not necessarily reflect the wealth of the families who live there. The simple answer to this argument is that plaintiffs have alleged that there is a correlation between a district's per pupil assessed valuation and the wealth of its residents and we treat these material facts as admitted by the demurrers.

More basically, however, we reject defendants' underlying thesis that classification by wealth is constitutional so long as the wealth is that of the district, not the individual. We think that discrimination on the basis of district wealth is equally invalid. The commercial and industrial property which augments a district's tax base is distributed unevenly throughout the State. To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments.[16] Surely, this is to rely on the most irrelevant of factors as the basis for educational financing.

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program at rates of tax which are relatively low, while other districts must tax themselves heavily to finance a low-expenditure program. . . . [Par.] One significant criterion of a public activity is that it seeks to provide equal treatment of equals. The present system of public education . . . in California fails to meet this criterion, both with respect to provision of services and with respect to the geographic distribution of the tax burden." (Cal. Senate Fact Finding Committee on Revenue and Taxation, *op. cit. supra*, p. 20.)

"California's present system of school support is based largely on a sharing between the state and school districts of the expenses of education. In this system of sharing, the school district has but one source of revenue—the property tax. Therefore, its ability to share depends upon its assessed valuation per pupil and its tax effort. The variations existing in local ability (assessed valuation per pupil) and tax effort (tax rate) present problems which deny equal educational opportunity and local tax equity." (Cal. State Dept. of Ed., Recommendations on Public School Support (1967) p. 69.) (Quoted in Horowitz & Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State* (1968) 15 U.C.L.A. L.Rev. 787, 806.)

[16] Defendants contend that different levels of educational expenditure do not affect the quality of education. However, plaintiffs' complaint specifically alleges the contrary, and for purposes of testing the sufficiency of a complaint against a general demurrer, we must take its allegations to be true.

Although we recognize that there is considerable controversy among educators over the relative impact of educational spending and environmental influences on school achievement (compare Coleman, et al., Equality of Educational Opportunity (U.S. Office of Ed. 1966) with Guthrie, Kleindorfer, Levin & Stout, Schools and Inequality (1971); see generally Coons & Sugarman, *supra*, 57 Cal. L. Rev. 305, 310–311, fn. 16), we note that the several courts which have considered contentions similar to defendants' have uniformly rejected them.

In *McInnis* v. *Shapiro* (N.D. Ill. 1968) 293 F. Supp. 327, affd. mem. sub nom. *McInnis* v. *Ogilvie* (1969) 394 U.S. 332, heavily relied on by defendants, a three-judge federal court stated: "Presumably, students receiving a $1,000 education are better educated that [sic] those acquiring a $600 schooling." (Fn. omitted.) (*Id.* at p. 331.) In *Hargrave* v. *Kirk* (M.D. Fla. 1970) 313 F. Supp. 944, vacated on other grounds sub nom. *Askew* v. *Hargrave* (1971) 401 U.S. 476, the court declared: "Turning now to the defenses asserted, it may be that in the abstract 'the difference in dollars available does not necessarily produce a difference in the quality of education.' But this abstract statement must give way to proof to the contrary in this case." (*Id.* at p. 947.)

Spending differentials of up to $130 within a district were characterized as "spectacular" in *Hobson* v. *Hansen*, *supra*, 269 F. Supp. 401. Responding to defendants' claim that the varying expenditures did not reflect actual educational benefits, the court replied: "To a great extent . . . defendants' own evidence verifies that the comparative per pupil expenditures do refer to actual educational advantages in the high-cost schools, especially with respect to the caliber of the teaching staff." (*Id.* at p. 438.)

Defendants, assuming for the sake of argument that the financing system does classify by wealth, nevertheless claim that no constitutional infirmity is involved because the complaint contains no allegation of purposeful or intentional discrimination. (Cf. *Gomillion* v. *Lightfoot* (1960) 364 U.S. 339.) Thus, defendants contend, any unequal treatment is only de facto, not de jure. Since the U.S. Supreme Court has not held de facto school segregation on the basis of race to be unconstitutional, so the argument goes, de facto classifications on the basis of wealth are presumptively valid.

We think that the whole structure of this argument must fall for want of a solid foundation in law and logic. First, none of the wealth classifications previously invalidated by the U.S. Supreme Court or this court has been the product of purposeful discrimination. Instead, these prior decisions have involved "unintentional" classifications whose impact simply fell more heavily on the poor.

For example, several cases have held that where important rights are at stake, the State has an affirmative obligation to relieve an indigent of the burden of his own poverty by supplying, without charge, certain goods or services for which others must pay. In *Griffin* v. *Illinois*, *supra*, 351 U.S. 12, the High Court ruled that Illinois was required to provide a poor defendant with a free transcript on appeal.[17] *Douglas* v. *California*, *supra*, 372 U.S. 353, held that an indigent person has a right to court-appointed counsel on appeal.

Other cases dealing with the factor of wealth have held that a State may not impose on an indigent certain payments which, although neutral on their face, may have a discriminatory effect. In *Harper* v. *Virginia Board of Elections*, *supra*, 383 U.S. 663, the High Court struck down a $1.50 poll tax, not because its purpose was to deter indigents from voting, but because its result might be such. (Id. at p. 666, footnote 3.) We held in In re *Antazo*, *supra*, 3 California 3d 100, that a poor defendant was denied equal protection of the laws if he was imprisoned simply because he could not afford to pay a fine. (Accord, *Tate* v. *Short*, *supra*, 39 U.S. L. Week 4301; *Williams* v. *Illinois*, *supra*, 399 U.S. 235;[18] see *Boddie* v. *Connecticut* (1971) 39 U.S.L. Week 4294, discussed footnote 21, *infra*.) In summary, prior decisions have invalidated classifications based on wealth even in the absence of a discriminatory motivation.

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[17] Justice Harlan, disenting in *Griffin*, declared: "Nor is this a case where the State's own action has prevented a defendant from appealing. [Citations.] All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action. [Par.] The Court thus holds that, at least in this area of criminal appeals, the Equal Protection Clause imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances." (351 U.S. at p. 34.)

[18] Numerous cases involving racial classifications have rejected the contention that purposeful discrimination is a prerequisite to establishing a violation of the equal protection clause. In *Hobson* v. *Hansen*, *supra*, 269 F.Supp. 401, Judge Skelly Wright stated: "Orthodox equal protection doctrine can be encapsulated in a single rule: government action which without justification imposes unequal burdens or awards unequal benefits is unconstitutional. The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme. [Par.] Theoretically,

We turn now to defendants' related contention that the instant case involves at most de facto discrimination. We disagree. Indeed, we find the case unusual in the extent to which governmental action is the cause of the wealth classifications. The school funding scheme is mandated in every detail by the California constitution and statutes. Although private residential and commercial patterns may be partly responsible for the distribution of assessed valuation throughout the State, such patterns are shaped and hardened by zoning ordinances and other governmental land-use controls which promote economic exclusivity. (Cf. *San Francisco Unified School Dist.* v. *Johnson* (1971) 3 Cal. 3d 937, 956.) Governmental action drew the school district boundary lines, thus determining how much local wealth each district would contain. (Cal. Const. art. IX, sec. 14; Ed. Code, sec. 1601 et seq; *Worthington S. Dist.* v. *Eureka S. Dist.* (1916) 173 Cal. 154, 156; *Hughes* v. *Ewing* (1892) 93 Cal. 414, 417; *Mountain View Sch. Dist.* v. *City Council* (1959) 168 Cal. App. 2d 89, 97.) Compared with *Griffin* and *Douglas*, for example, official activity has played a significant role in establishing the economic classifications challenged in this action.[19]

Finally, even assuming arguendo that defendants are correct in their contention that the instant discrimination based on wealth is merely de facto, and not de jure,[20] such discrimination cannot be justified by analogy to de facto racial segregation. Although the U.S. Supreme Court has not yet ruled on the constitutionality of de facto racial segregation, this Court 8 years ago held such segregation invalid, and declared that school boards should take affirmative steps to alleviate racial imbalance, however created. (*Jackson* v. *Pasadena City School Dist.* (1963) 59 Cal. 2d 876, 881; *San Francisco Unified School Dist.* v. *Johnson*, *supra*, 3 Cal. 3d 937). Consequently, any discrimination based on wealth can hardly be vindicated by reference to de facto racial segregation, which we have already condemned. In sum, we are of the view that the school financing system discriminates on the basis of the wealth of a district and its residents.

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therefore, purely irrational inequalities even between two schools in a culturally homogenous, uniformly white suburb would raise a real constitutional question." (Fns. omitted.) (*Id.* at p. 497.) (See also *Hawkins* v. *Town of Shaw, Mississippi* (5th Cir. 1971) 437 F.2d 1286; *Norwalk CORE* v. *Norwalk Redevelopment Agency* (2d Cir. 1968) 395 F. 2d 920, 931.) No reason appears to impose a more stringent requirement where wealth discrimination is charged.

[19] One commentator has described state involvement in school financing inequalities as follows: "[The states] have determined that there will be public education, collectively financed out of general taxes; they have determined that the collective financing will not rest mainly on a statewide tax base, but will be largely decentralized to districts; they have composed the district boundaries, thereby determining wealth distribution among districts; in so doing, they have not only sorted education-consuming households into groups of widely varying average wealth, but they have sorted non-school-using taxpayers—households and others—quite unequally among districts; and they have made education compulsory." His conclusion is that "[s]tate involvement and responsibilities are indisputable." (Michelman, *supra*, 83 Harv. L. Rev. 7, 50, 48.)

[20] We recently pointed out the difficulty of categorizing *racial* segregation as either de facto or de jure. (*San Francisco Unified School Dist.* v. *Johnson*, *supra*, 3 Cal. 3d 937, 956–957.) We think the same reasoning applies to classifications based on wealth. Consequently, we decline to attach an oversimplified label to the complex configuration of public and private decisions which has resulted in the present alloaction of educational funds.

B—EDUCATION AS A FUNDAMENTAL INTEREST

But plaintiff's equal protection attack on the fiscal system has an additional dimension. They assert that the system not only draws lines on the basis of wealth but that it "touches upon," indeed has a direct and significant impact upon, a "fundamental interest," namely education. It is urged that these two grounds, particularly in combination, establish a demonstrable denial of equal protection of the laws. To this phase of the argument we now turn our attention.

Until the present time wealth classifications have been invalidated only in conjunction with a limited number of fundamental interests—rights of defendants in criminal cases (*Griffin; Douglas; Williams; Tate; Antazo*) and voting rights (*Harper; Cipriano* v. *City Houma* (1969) 395 U.S. 701; *Kramer* v. *Union School District* (1969) 395 U.S. 621; cf. *McDonald* v. *Board of Elections*).[21] Plaintiff's contention—that education is a fundamental interest which may not be conditioned on wealth—is not supported by any direct authority.[22]

We, therefore, begin by examining the indispensable role which education plays in the modern industrial state. This role, we believe, has two significant aspects: First, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life.

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[21] But in *Boddie* v. *Connecticut*, *supra*, 39 U.S. L.Week 4294, the Supreme Court held that poverty cannot constitutionally bar an individual seeking a divorce from access to the *civil* courts. Using a due process, rather than an equal protection, rationale, the court ruled that an indigent could not be required to pay court fees and costs for service of process as a precondition to commencing a divorce action.

[22] In *Shapiro* v. *Thompson* (1969) 394 U.S. 618, in which the Supreme Court invalidated state minimum residence requirements for welfare benefits, the high court indicated, in dictum, that certain wealth discrimination in the area of education would be unconstitutional: "We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools." (*Id.* at p. 633.) Although the high court referred to actual exclusion from school, rather than discrimination in expenditures for education, we think the constitutional principle is the same. (See fn. 24, and accompanying text.)

A federal Court of Appeals has also held that education is arguably a fundamental interest. In *Hargrave* v. *McKinney* (5th Cir. 1969) 413 F.2d 320, the Fifth Circuit ruled that a three-judge district court must be convened to consider the constitutionality of a Florida statute which limited the local property tax rate which a county could levy in raising school revenue. Plaintiffs contended that the statute violated the equal protection clause because it allowed counties with a high per-pupil assessed valuation to raise much more local revenue than counties with smaller tax bases. The court stated: "The equal protection argument advanced by plaintiffs is the crux of the case. Nothing that lines drawn on wealth are suspect [fn. omitted] and that we are here dealing with interests which may well be deemed fundamental. [fn. omitted] we cannot say that there is no reasonably arguable theory of equal protection which would support a decision in favor of the plaintiffs. [Citations.]" (*Id.* at p. 324.)

On remand, a three-judge court held the statute unconstitutional because there was no rational basis for the discriminatory effect which it had in poor counties. Having invalidated the statute under the traditional equal protection test, the court declined to consider plaintiffs' contention that education was a fundamental interest, requiring application of the "strict scrutiny" equal protection standard. (*Hargrave* v. *Kirk*, *supra*, 313 F. Supp. 944). On appeal, the Supreme Court vacated the district court's decision on other grounds, but indicated that on remand the lower court should thoroughly explore the equal protection issue. (*Askew* v. *Hargrave* (1971) 401 U.S. 476.)

> [T]he pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable.

(Note, "Development in the Law—Equal Protection" (1969) 82 Harv. L. Rev. 1065, 1129.) Thus, education is the lifetime of both the individual and society.

The fundamental importance of education has been recognized in other contexts by the U.S. Supreme Court and by this court. These decisions—while not legally controlling on the exact issue before us—are persuasive in their accurate factual description of the significance of learning.[23]

The classic expression of this position came in *Brown* v. *Board of Education* (1954) 347 U.S. 483, which invalidated de jure segregation by race in public schools. The high court declared:

> Today, education is perhaps the most important function of State and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the Armed Forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms. (Id., at p. 493.)

The twin themes of the importance of education to the individual and to society have recurred in numerous decisions of this court. Most recently in *San Francisco Unified School District* v. *Johnson*, *supra*, 3 Cal. 3d 937, where we considered the validity of an antibusing statute, we observed,

> Unequal education, then, leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society. (Id., at p. 950.)

Similarly, in *Jackson* v. *Pasadena City School District*, *supra*, 59 Cal. 2d 876, which raised a claim that school districts had been gerrymandered to avoid integration, this court said:

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[23] Defendants contend that these cases are not of precedential value because they do not consider education in the context of wealth discrimination, but merely in the context of racial segregation or total exclusion from school. We recognize this distinction, but cannot agree with defendants' conclusion. Our quotation of these cases is not intended to suggest that they *control* the legal result which we reach here, but simply that they eloquently express the crucial importance of education.

> In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the State must be made available to all on an equal basis. (Id., at p. 880.)

When children living in remote areas brought an action to compel local school authorities to furnish them bus transportation to class, we stated:

> We indulge in no hyperbole to assert that society has a compelling interest in affording children an opportunity to attend school. This was evidenced more than three centuries ago, when Massachusetts provided the first public school system in 1647. [Citation.] And today an education has become the sine qua non of useful existence . . . . In light of the public interest in conserving the resource of young minds, we must unsympathetically examine any action of a public body which has the effect of depriving children of the opportunity to obtain an education. (Fn. omitted.) (*Manjares* v. *Newton* (1966) 64 Cal. 2d 365, 375–376.)

And long before these last mentioned cases, in *Piper* v. *Big Pine School Dist.*, *supra*, 193 Cal. 664, where an Indian girl sought to attend State public schools, we declared:

> [T]he common schools are doorways opening into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities. Opportunities for securing employment are often more or less dependent upon the rating which a youth, as a pupil of our public institutions, has received in his schoolwork. These are rights and privileges that cannot be denied. (Id. at p. 673; see also *Ward* v. *Floyd* (1874) 48 Cal. 36.)

Although *Manjares* and *Piper* involved actual exclusion from the public schools, surely the right to an education today means more than access to a classroom.[24] (See *Horowitz & Neitring*, *supra*, 15 U.C.L.A. Rev. 787, 811.)

It is illuminating to compare in importance the right to an education with the rights of defendants in criminal cases and the right to vote—two "fundamental interests" which the Supreme Court has already protected against discrimination based on wealth. Although an individual's interest in his freedom is unique, we think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer.

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[24] Cf. *Reynolds* v. *Sims* (1964) 377 U.S. 533, 562–563, where the Supreme Court asserted that the right to vote is impaired not only when a qualified individual is barred from voting, but also when the impact of his ballot is diminished by unequal electoral apportionment: "It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or ten times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. . . . Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. . . . One must be ever aware that the Constitution forbids sophisticated as well as simple-minded modes of discrimination.' [Citation.]" (Fn. omitted.)

> [E]ducation not only affects directly a vastly greater number of persons than the criminal law, but it affects them in ways which—to the State—have an enormous and much more varied significance. Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of a democratic society—participation, communication, and social mobility, to name but a few. (Footnote omitted.) (*Coons, Clune & Sugarman*, *supra*, 57 Cal. L. Rev. 305, 362–363.)

The analogy between education and voting is much more direct: Both are crucial to participation in, and the functioning of, a democracy. Voting has been regarded as a fundamental right because it is "preservative of the other basic civil and political rights . . ." (*Reynolds* v. *Sims*, *supra*, 377 U.S. 533, 562; see *Yick Wo* v. *Hopkins* (1886) 118 U.S. 356, 370). The drafters of the California constitution used this same rationale—indeed, almost identical language—in expressing the importance of education. Article IX, section 1 provides:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement. (See also *Piper* v. *Big Pine School Dist.*, *supra*, 193 Cal. 664, 668.)

At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of and the interest in public issues which are the spur to involvement in other civic and political activities.

The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. The U.S. Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping domestic values. The public school has been termed "the most powerful agency for promoting cohesion among a heterogeneous democratic people . . . at once the symbol of our democracy and the most persuasive means for promoting our common destiny." (*McCollum* v. *Board of Education* (1948) 333 U.S. 203, 216, 231 (Frankfurter, J., concurring).) In *Abington School Dist.* v. *Schempp* (1963) 374 U.S. 203, it was said that:

> Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. (*Id.* at p. 230; Brennan, J., concurring.)[25]

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[25] The sensitive interplay between education and the cherished First Amendment right of free speech has also received recognition by the United States Supreme Court. In *Shelton* v. *Tucker* (1960) 364 U.S. 479, the court declared: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." (*Id.* at p. 487.) Similarly, the court observed in *Keyishian* v. *Board of Regents* (1967) 385 U.S. 589, "The classroom is peculiarly the 'market place of ideas.' The Nation's future depends upon leaders trained through wide exposure to [a] robust exchange of ideas. . . ." (*Id.* at p. 603.) (See also *Tinker* v. *Des Moines School Dist.* (1969) 393 U.S. 503, 512; *Epperson* v. *Arkansas* (1968) 393 U.S. 97.)

> We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a "fundamental interest."[26]

First, education is essential in maintaining what several commentators have termed "free enterprise democracy"—that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background. Accordingly, the public schools of this State are the bright hope for entry of the poor and oppressed into the mainstream of American society.[27]

Second, education is universally relevant.

> Not every person finds it necessary to call upon the fire department or even the police in an entire lifetime. Relatively few are on welfare. Every person, however, benefits from education. . . . (Fn. Omitted.) (*Coons, Clune & Sugarman, supra*, 57 Cal.L.Rev. at p. 388.)

Third, public education continues over a lengthy period of life—between 10 and 13 years. Few other government services have such sustained, intensive contact with the recipient.

Fourth, education is unmatched in the extent to which it molds the personality of the youth of society. While police and fire protection, garbage collection and street lights are essentially neutral in their effect on the individual psyche, public education actively attempts to shape a child's personal development in a manner chosen not by the child or his parents but by the State. (*Coons, Clune & Sugarman, supra*, 57 Cal.L.Rev. at p. 389.)

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[26] The uniqueness of education was recently stressed by the United States Supreme Court in *Palmer* v. *Thompson* (1971) 39 U.S. L.Week 4759, where the court upheld the right of Jackson, Mississippi to close its municipal swimming pools rather than operate them on an integrated basis. Distinguishing an earlier Supreme Court decision which refused to permit the closing of schools to avoid desegregation, the court stated: "Of course that case did not involve swimming pools but rather public schools, an enterprise we have described as 'perhaps the most important function of state and local governments.' *Brown* v. *Board of Education, supra*, at 493." (*Id.* at p. 4760, fn. 6.) This theme was echoed in the concurring opinion of Justice Blackmun, who wrote: "The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities." *Id.* at p. 4762.)

[27] In this context, we find persuasive the following passage from *Hobson* v. *Hansen, supra*, 269 F. Supp. 401, which held, inter alia, that higher per-pupil expenditures in predominantly white schools than in black schools in the District of Columbia deprived "the District's Negro and poor public school children of their right to equal educational opportunity with the District's white and more affluent public school children." (*Id.* at p. 406.)

"If the situation were one involving racial imbalance but in some facility other than the public schools, or unequal educational opportunity but without any Negro or poverty aspects (e.g., unequal schools all within an economically homogeneous white suburb), it might be pardonable to uphold the practice on a minimal showing of rational basis. But the fusion of these two elements in *de facto* segregation in public schools irresistably calls for additional justification. What supports this call is . . . the degree to which the poor and the Negro must rely on the public schools in rescuing themselves from their depressed cultural and economic condition. . . ." (*Id.* at pp. 508.) Although we realize that the instant case does not present the racial aspects present in *Hobson*, we find compelling that decision's assessment of the important social role of the public schools.

> [T]he influence of the school is not confined to how well it can teach the disadvantaged child; it also has a significant role to play in shaping the student's emotional and psychological makeup. (*Hobson* v. *Hansen*, *supra*, 269 F. Supp. 401, 483.)

Finally, education is so important that the State has made it compulsory—not only in the requirement of attendance but also by assignment to a particular district and school. Although a child of wealthy parents has the opportunity to attend a private school, this freedom is seldom available to the indigent. In this context, it has been suggested that

> a child of the poor assigned willy-nilly to an inferior State school takes on the complexion of a prisoner, complete with a minimum sentence of 12 years. (*Coons, Clune & Sugarman, supra*, 57 Cal. L. Rev. at p. 388.)

C—THE FINANCING SYSTEM IS NOT NECESSARY TO ACCOMPLISH A COMPELLING STATE INTEREST

We now reach the final step in the application of the "strict scrutiny" equal protection standard—the determination of whether the California school financing system, as presently structured, is necessary to achieve a compelling State interest.

The State interest which defendants advance in support of the current fiscal scheme is California's policy "to strengthen and encourage local responsibility for control of public education." (Ed. Code, § 17300.) We treat separately the two possible aspects of this goal:

1. The granting to local districts of effective decisionmaking power over the administration of their schools; and
2. The promotion of local fiscal control over the amount of money to be spent on education.

The individual district may well be in the best position to decide whom to hire, how to schedule its educational offerings, and a host of other matters which are either of significant local impact or of such a detailed nature as to require decentralized determination. But even assuming arguendo that local administrative control may be a compelling State interest, the present financial system cannot be considered necessary to further this interest. No matter how the State decides to finance its system of public education, it can still leave this decision-making power in the hands of local districts.

The other asserted policy interest is that of allowing a local district to choose how much it wishes to spend on the education of its children. Defendants argue:

> [I]f one district raises a lesser amount per pupil than another district, this is a matter of choice and preference of the individual district, and reflects the individual desire for lower taxes rather than an expanded educational pro-

> gram, or may reflect a greater interest within that district in such other services that are supported by local property taxes as, for example, police and fire protection or hospital services.

We need not decide whether such decentralized financial decision-making is a compelling State interest, since under the present financing system, such fiscal freewill is a cruel illusion for the poor school districts. We cannot agree that Baldwin Park residents care less about education than those in Beverly Hills solely because Baldwin Park spends less than $600 per child while Beverly Hills spends over $1,200. As defendants themselves recognize, perhaps the most accurate reflection of a community's commitment to education is the rate at which its citizens are willing to tax themselves to support their schools. Yet by that standard, Baldwin Park should be deemed far more devoted to learning than Beverly Hills, for Baldwin Park citizens levied a school tax of well over $5 per $100 of assessed valuation, while residents of Beverly Hills paid only slightly more than $2.

In summary, so long as the assessed valuation within a district's boundaries is a major determinant of how much it can spend for its schools, only a district with a large tax base will be truly able to decide how much it really cares about education. The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option.

It is convenient at this point to dispose of two final arguments advanced by defendants. They assert, first, that territorial uniformity in respect to the present financing system is not constitutionally required; and secondly, that if under an equal protection mandate relative wealth may not determine the quality of public education, the same rule must be applied to all tax-supported public services.

In support of their first argument, defendants cite *Salsburg* v. *Maryland* (1954) 346 U.S. 545 and *Board of Education* v. *Watson*, *supra*, 63 Cal. 2d 829. We do not find these decisions apposite in the present context, for neither of them involved the basic constitutional interests here at issue.[28] We think that two lines of recent decisions have indicated that where fundamental rights or suspect classifications are at stake, a State's general freedom to discriminate on a geographical basis will be significantly curtailed by the equal protection clause. (See *Horowitz & Neitring*, *supra*, 15 U.C.L.A. L. Rev. 787.)

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[28] *Salsburg* upheld a Maryland statute which allowed illegally seized evidence to be admitted in gambling prosecutions in one county, while barring use of such evidence elsewhere in the State. But when *Salsburg* was decided, the Fourth and Fourteenth Amendments had not yet been interpreted to prohibit the admission of unlawfully procured evidence in State trials. (*Mapp* v. *Ohio* (1961) 367 U.S. 643.) Consequently, the Supreme Court in *Salsburg* treated the Maryland statute as simply establishing a rule of evidence, which was purely procedural in nature. (346 U.S. at p. 550: see pp. 554–555 (Douglas, J., dissenting).)

In *Watson* we rejected a constitutional attack on a statute which required special duties of the tax assessor in counties with a population in excess of four million, even though we recognized that only Los Angeles County would be affected by the legislation. In both cases, the courts simply applied the traditional equal protection test and sustained the provision after finding some rational basis for the geographic classification.

The first group of precedents consists of the school closing cases, in which the Supreme Court has invalidated efforts to shut schools in one part of a State while schools in other areas continued to operate. In *Griffin* v. *School Board* (1964) 377 U.S. 218 the court stated:

> A State, of course, has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties, the legislature "having in mind the needs and desires of each." *Salsburg* v. *Maryland, supra*, 346 U.S., at 552. . . . But the record in the present case could not be clearer that Prince Edward's public schools were closed . . . for one reason, and one reason only: to ensure . . . that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one. . . . (*Id.* at p. 231.)

Similarly, *Hall* v. *St. Helena Parish School Board* (E.D. La. 1961) 197 F. Supp. 649, affd. mem. (1962) 368 U.S. 515 held that a statute permitting a local district faced with integration to close its schools was constitutionally defective, not merely because of its racial consequences:

> More generally, the act is assailable because its application in one parish, while the State provides public schools elsewhere, would unfairly discriminate against the residents of that parish, irrespective of race. . . . [A]bsent a reasonable basis for so classifying, a State cannot close the public schools in one area while, at the same time, it maintains schools elsewhere with public funds. (Fn. omitted.) (*Id.* at pp. 651 656.)

The *Hall* court specifically distinguished *Salsburg* stating:

> The holding of *Salsburg* v. *State of Maryland* permitting the State to treat differently, for different localities, the rule against admissibility of illegally obtained evidence no longer obtains in view of *Mapp* v. *Ohio*, 367 U.S. 643 . . . . Accordingly, reliance on that decision for the proposition that there is no constitutional inhibition to geographic discrimination in the area of civil rights is misplaced. . . . [T]he Court [in *Salsburg*] emphasized that the matter was purely "procedural" and "local." Here, the substantive classification is discriminatory. . . . (*Id.* at pp. 658–659, fn. 29.)

In the second group of cases, dealing with apportionment, the high court has held that accidents of geography and arbitrary boundary lines of local government can afford no ground for discrimination among a State's citizens. (Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined* (1968) 35 U.Chi.L.Rev. 583, 585; see also Wise, Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity (1969) pp. 66–92.) Specifically rejecting attempts to justify unequal districting on the basis of various geographic factors, the court declared:

> Diluting the weight of votes because of place of residence impairs basic constitutional rights under the 14th amendment

> just as much as invidious discriminations based upon factors such as race [citation] or economic status, *Griffin* v. *Illinois*, 351 U.S. 12, *Douglas* v. *California*, 372 U.S. 353. . . . The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. (*Reynolds* v. *Sims*, *supra*, 377 U.S. 533, 566, 567.)

If a voter's address may not determine the weight to which his ballot is entitled, surely it should not determine the quality of his child's education.[29]

Defendants' second argument boils down to this: If the equal protection clause commands that the relative wealth of school districts may not determine the quality of public education, it must be deemed to direct the same command to all governmental entities in respect to all tax-supported public services; [30] and such a principle would spell the destruction of local government. We unhesitatingly reject this argument. We cannot share defendants' unreasoned apprehensions of such dire consequences from our holding today. Although we intimate no views on other governmental services,[31] we are satisfied that, as we have explained, its uniqueness among public activities clearly demonstrates that education must respond to the command of the equal protection clause.

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[29] Defendants also claim that permitting school districts to retain their locally raised property tax revenue does not violate equal protection because "[t]he power of a legislature in respect to the allocation and distribution of public funds is not limited by any requirement of uniformity or of equal protection of the laws." As an abstract proposition of law, this statement is clearly overboard. For example, a state Legislature cannot make tuition grants from state funds to segregated private schools in order to avoid integration. (*Brown* v. *South Carolina State Board of Education* (D.S.C. 1968) 296 F. Supp. 199, affd. mem. (1968) 393 U.S. 222; *Poindexter* v. *Louisiana Financial Assistance Commission* (E.D. La. 1967) 275 F. Supp. 833, affd. mem. (1968) 389 U.S. 571.) The cases cited by defendants are inapplicable in the present context. Neither *Hess* v. *Mullaney* (9th Cir. 1954) 213 F. 2d 635, cert. den. sub nom. *Hess* v. *Dewey* (1954) 348 U.S. 836, nor *Gen: Amer. Tank Car Corp.* v. *Day* (1926) 270 U.S. 367 involved a claim to a fundamental constitutional interest, such as education. (See Coons, Clune & Sugarman, supra, 57 Cal. L. Rev. at p. 371, fn. 184.)

[30] In support of this contention, defendants cite the following quotation from *MacMillan Co.* v. *Clarke* (1920) 184 Cal. 491, 500, in which we upheld the constitutionality of a statute providing free textbooks to high school pupils: "[T]he free school system . . . is not primarily a service to the individual pupils, but to the community, just as fire and police protection, public libraries, hospitals, playgrounds, and the numerous other public service utilities which are provided by taxation, and minister to individual needs, are for the benefit of the general public" Whatever the case as to the other services, we think that in this era of high geographic mobility, the "general public" benefited by education is not merely the particular community where the schools are located, but the entire state.

[31] We note, however, that the Court of Appeals for the Fifth Circuit has recently held that the equal protection clause forbids a town to discriminate racially in the provision of municipal services. In *Hawkins* v. *Town of Shaw, Mississippi*, *supra*, 437 F. 2d 1286, the court held that the town of Shaw, Mississippi had an affirmative duty to equalize such services as street paving and lighting, sanitary sewers, surface water drainage, water mains and fire hydrants. The decision applied the "strict scrutiny" equal protection standard and reversed the decision of the district court which, relying on the traditional test, had found no constitutional infirmity.

Although racial discrimination was the basis of the decision, the court intimated that wealth discrimination in the provision of city services might also be invalid: "Appellants also alleged the discriminatory provision of municipal services based on wealth. This claim was dropped on appeal. It is interesting to note, however, that the Supreme Court has stated that wealth as well as race renders a classification highly suspect and thus demanding of a more exacting judicial scrutiny [Citation.]" (*Id.* at p. 1287, fn. 1.)

We, therefore, arrive at these conclusions. The California public school financing system, as presented to us by plaintiffs' complaint supplemented by matters judicially noticed, since it deals intimately with education, obviously touches upon a fundamental interest. For the reasons we have explained in detail, this system conditions the full entitlement to such interest on wealth, classifies its recipients on the basis of their collective affluence and makes the quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbook of his parents. We find that such financing system as presently constituted is not necessary to the attainment of any compelling State interest. Since it does not withstand the requisite "strict scrutiny," it denies to the plaintiffs and others similarly situated the equal protection of the laws.[32] If the allegations of the complaint are sustained, the financial system must fall and the statutes comprising it must be found unconstitutional.

IV

Defendants' final contention is that the applicability of the equal protection clause to school financing has already been resolved adversely to plaintiffs' claims by the Supreme Court's summary affirmance in *McInnis* v. *Shapiro*, *supra*, 293 F. Supp. 327, aff'd. mem. sub. nom. *McInnis* v. *Ogilvie* (1969) 394 U.S. 322, and *Burruss* v. *Wilkerson* (W.D. Va. 1969) 310 F. Supp. 572, aff'd. mem. (1970) 397 U.S. 44. The trial court in the instant action cited McInnis in sustaining defendants' demurrers.

The plaintiffs in *McInnis* challenged the Illinois school financing system, which is similar to California's, as a violation of the equal protection and due process clauses of the 14th amendment because of the wide variations among districts in school expenditures per pupil. They contended that:

> . . . *only* a financing system which apportions public funds according to the educational needs of the students satisfies the 14th amendment (Footnote omitted) (293 F. Supp at p. 331).

A three-judge Federal district court concluded that the complaint stated no cause of action

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[32] The United States Commission on Civil Rights has stated that "[i]t may well be that the substantial fiscal and tangible inequalities which at present exist between city and suburban school districts . . . contravene the 14th amendment's equal protection guarantee." Relying on the quotation from *Brown* v. *Board of Education*, *supra*,—" 'where a State provides education, it must be provided to all on equal terms' "—the commission concluded that this passage "would appear to render at least those substantial disparities which are readily identifiable—such as disparities in fiscal support, average per pupil expenditure, and average pupil-teacher ratios—unconstitutional." The commission also cited the reappointment decisions and *Griffin* v. *Illinois*, *supra*, concluding, "Here, as in *Griffin*, the State may be under no obligation to provide the service, but having undertaken to provide it, the State must insure that the benefit is received by the poor as well as the rich in substantially equal measure." (U.S. Commission on Civil Rights, *op. cit. supra*, p. 261 fn. 282.)

> . . . for two principal reasons:
>
> 1. The 14th amendment does not require that public school expenditures be made only on the basis of pupils' *educational* needs; and
>
> 2. The lack of judicially manageable standards makes this controversy nonjusticiable.
>
> (Footnote omitted.) (293 F. Supp. at p. 329.) [Italics added.]

The court additionally rejected the applicability of the strict scrutiny equal protection standard and ruled that the Illinois financing scheme was rational because it was

> . . . designed to allow individual localities to determine their own tax burden according to the importance which they place upon public schools (*Id.* at p. 333.)

The U.S. Supreme Court affirmed per curiam with the following order:

> The motion to affirm is granted and the judgment is affirmed (394 U.S. 322).

No cases were cited in the High Court's order; there was no oral argument.[33]

Defendants argue that the High Court's summary affirmance forecloses our independent examination of the issues involved. We disagree.

Since *McInnis* reached the Supreme Court by way of appeal from a three-judge Federal court, the High Court's jurisdiction was not discretionary (28 U.S.C. § 1253 (1964)). In these circumstances, defendants are correct in stating that a summary affirmance is formally a decision on the merits. However, the significance of such summary dispositions is often unclear, especially where, as in *McInnis*, the Court sites no cases as authority and guidance. One commentator has stated:

> It has often been observed that the dismissal of an appeal, technically an adjudication on the merits, is in practice often the substantial equivalent of a denial of certiorari.[34] (D. Currie. *The Three-Judge District Court in Constitutional Litigation* (1964) 32 U. Chi. L. Rev. 1, 74, fn. 365.)

Frankfurter and Landis had suggested earlier that the pressure of the Court's docket and differences of opinion among the judges operate

> . . . to subject the obligatory jurisdiction of the Court to discretionary considerations not unlike those governing *certiorari*." (Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1929* (1930) 44 Harv.L.Rev. 1, 14.)

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[33] The plaintiffs in *Burruss* attacked the constitutionality of the Virginia School financing scheme. The decision of the district court, which dismissied their complaint for failure to state a claim, was cursory, containing little legal reasoning and relying on McInnis v. Shapiro for precedent. Consequently, the parties to the instant action have centered their discussion on *McInnis*, and we follow suit.

[34] Although the Supreme Court affirmed the *McInnis* decision, rather than dismissing the appeal, Currie's statement is probably entirely applicable anyway. In upholding decisions of lower courts of appeal, the Supreme Court "will affirm an appeal from a federal court, but will dismiss an appeal from a state court 'for want of a substantial federal question.' Only history would seem to justify this distinction. . . ." (Stern & Gressman, Supreme Court Practice (4th ed. 1969) at p. 233.)

Between 60 and 84 percent of appeals in recent years have been summarily handled by the Supreme Court without opinion. (Stern & Gressman, *op. cit, supra*, at p. 194.) [35]

At any rate, the contentions of the plaintiffs here are significantly different from those in *McInnis*. The instant complaint employs a familiar standard which has guided decisions of both the United States and California supreme courts: discrimination on the basis of wealth is an inherently suspect classification which may be justified only on the basis of a compelling State interest. (See cases cited, part III, *supra*.) By contrast, the *McInnis* plaintiffs repeatedly emphasized "educational needs" as the proper standard for measuring school financing against the equal protection clause. The district court found this a "nebulous concept" (293 F. Supp. 327, 329, footnote 4)—so nebulous as to render the issue nonjusticiable for lack of " 'discoverable and manageable standards' " [36] (*Id.* at p. 335). In fact, the nonjusticiability of the "educational needs" standard was the basis for the *McInnis* holding; the district court's additional treatment of the substantive issues was purely dictum. In this context, a Supreme Court affirmance can hardly be considered dispositive of the significant and complex constitutional questions presented here.[37]

Assuming, as we must in light of the demurrers, the truth of the material allegations of the first stated cause of action, and considering in conjunction therewith the various matters which we have judicially noticed, we are satisfied that plaintiff children have alleged facts showing that the public school financing system denies them equal protection of the laws because it produces substantial disparities among school districts in the amount of revenue available for education.

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[35] Summary disposition of a case by the Supreme Court need not prevent the court from later holding a full hearing on the same issue. The constitutionality of compulsory school flag salutes is a case in point. For three successive years—in *Leoles* v. *Landers* (1937) 302 U.S. 656; *Hering* v. *State Board of Education* (1938) 303 U.S. 624; and *Johnson* v. *Deerfield* (1939) 306 U.S. 621—the Supreme Court summarily upheld lower court decisions which ruled such requirements constitutional.

The very next year the high court granted certiorari in *Minersville District* v. *Gobitis* (1940) 310 U.S. 586, thereby providing for oral argument and a full briefing of the issue. Although in *Gobitis* it adhered to its earlier per curiam decisions, three years later the court reversed its position and ruled such requirements invalid. (*Board of Education* v. *Barnette* (1943) 319 U.S. 624.)

[36] The plaintiffs in *Burruss* also relied on an "educational needs" standard in their attack on the Virginia school financing scheme, causing the district court to remark: "However, the courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State." (310 F. Supp. at p. 574.)

[37] In a comprehensive article on equal protection and school financing, three commentators have stated: "The meaning of *McInnis* v. *Shapiro* is ambiguous; but the case hardly seems another *Plessy* v. *Ferguson*. Probably but a temporary setback, it was the predictable consequence of an effort to force the court to precipitous and decisive action upon a novel and complex issue for which neither it nor the parties were ready. . . . [T]he plaintiffs' virtual absence of intelligible theory left the district court bewildered. Given the pace and character of the litigation, confusion of court and parties may have been inevitable, foreordaining the summary disposition of the appeal. The Supreme Court could not have been eager to consider an issue of this magnitude on such a record. Concededly its per curiam affirmance is formally a decision on the merits, but it need not imply the Court's permanent withdrawal from the field. It is probably most significant as an admonition to the protagonists to clarify the options before again invoking the Court's aid." (Coons, Clune & Sugarman, *supra*, 57 Cal. L. Rev. at pp. 308–309.)

The Supreme Court's willingness to order a full hearing by a federal district court on the issues raised in *Hargrave* v. *Kirk* (see *Askew* v. *Hargrave*, *supra*, 401 U.S. 476), indicates to us that it does not consider the applicability of the equal protection clause to educational financing foreclosed by its decisions in *McInnis* and *Burruss*.

The second stated cause of action by plaintiff parents by incorporating the first cause has, of course, sufficiently set forth the constitutionally defective financing scheme. Additionally, the parents allege that they are citizens and residents of Los Angeles County; that they are owners of real property assessed by the county; that some of defendants are county officials; and that as a direct result of the financing system, they are required to pay taxes at a higher rate than taxpayers in many other districts in order to secure for their children the same or lesser educational opportunities. Plaintiff parents join with plaintiff children in the prayer of the complaint that the system be declared unconstitutional and that defendants be required to restructure the present financial system so as to eliminate its unconstitutional aspects. Such prayed for relief is strictly injunctive and seeks to prevent public officers of a county from acting under an allegedly void law. Plaintiff parents then clearly have stated a cause of action since:

> . . . [i]f the . . . law is unconstitutional, then county officials may be enjoined from spending their time carrying out its provisions . . . . (*Blair* v. *Pitchess* (1971) 5 Cal. 3d —; Code Civ. Proc., sec. 526a.)[38]

Because the third cause of action incorporates by reference the allegations of the first and second causes and simply seeks declaratory relief, it obviously sets forth facts sufficient to constitute a cause of action.

By our holding today we further the cherished idea of American education that in a democratic society free public schools shall make available to all children equally the abundant gifts of learning. This was the credo of Horace Mann, which has been the heritage and the inspiration of this country.

> I believe [he wrote], in the existence of a great, immortal immutable principle of natural law, or natural ethics—a principle antecedent to all human institutions, and incapable of being abrogated by any ordinance of man . . . which proves the *absolute right* to an education of every human being that comes into the world, and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all. . . . [Original italics.] (Old South Leaflets V, No. 109 (1846) pp. 177–180 (Tenth annual Report to Mass. State Bd. of Ed.), quoted in "Readings in American Education" (1963 Lucio ed.) p. 336.)

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[38] Although plaintiff parents bring this action against state, as well as county, officials, it has been held that state officers too may be sued under section 526a. (*Blair* v. *Pitchess*, *supra*, 5 Cal. 3d —; *California State Employees' Assn.* v. *Williams* (1970) 7 Cal. App. 3d 390, 395; *Ahlgren* v. *Carr* (1962) 209 Cal. App. 2d 248, 252–254.)

The judgment is reversed and the cause remanded to the trial court with directions to overrule the demurrers and to allow defendants a reasonable time within which to answer.

Sullivan, J.

We concur:

Wright, C. J.
Peters, J.
Tobriner, J.
Mosk, J.
Burke, J.

DISSENTING OPINION BY McCOMB, J.

I dissent. I would affirm the judgment for the reasons expressed by Mr. Justice Dunn in the opinion prepared by him for the Court of Appeal in *Serrano* v. *Priest* (Cal. App.) 89 Cal. Rptr. 345.

McComb, J.

VAN DUSARTZ *v.* HATFIELD

334 F.Supp. 870 (D.C. Minn. 1971)

MEMORANDUM AND ORDER

FILED OCTOBER 12, 1971

This is one of three actions brought by various parties to challenge the constitutional validity of Minnesota's system of financing public elementary and secondary education. The companion cases are *Minnesota Federation of Teachers, et al.* v. *Hatfield, et al.*, 4–71 Civ. 458. and *Minnesota Real Estate Taxpayers Association, et al.* v. *State of Minnesota, et al.*, 3–71 Civ. 233.

Plaintiffs in the above-entitled action base their claims solely on the alleged denial of equal protection of the laws to a class of plaintiff schoolchildren they purport to represent. Jurisdiction of this court is invoked pursuant to 28 U.S.C. 1343 (3) and (4) because plaintiffs' cause of action arises under the Civil Rights Act, 42 U.S.C. section 1983.

Defendants have moved to dismiss in all three cases on the grounds that the complaints fail to state a claim upon which relief can be granted and that the cases are moot.

Since the above-entitled case appears to be on solid jurisdictional grounds as to the plaintiff pupils and does not raise pendent claims under the laws or constitution of Minnesota, this Court chooses to analyze the narrow claims presented here in light of the recent California Supreme Court decision in *Serrano* v. *Priest*, 5 Cal. 3d 584. ____P.2d______(1971). Although separate orders will be entered denying defendants' motions to dismiss in the other two cases, the Court chooses to postpone any ruling on the other complex issues presented by those complaints.

The primary purpose here is to test the plaintiff children's cause of action, and to examine the substantive issues raised by their complaint. With proper deference to the legislature, it is appropriate to consider the correctness of the *Serrano* rule and to examine the applicability of the equal protection clause to the instant case.

The issue posed by the children, here as in *Serrano*, is whether pupils in publicly financed elementary and secondary schools enjoy a right under the equal protection guarantee of the 14th amendment to have the level of spending for their education unaffected by variations in the taxable wealth of their school district or their parents. This Court concludes that such a right indeed exists and that the principle announced in *Serrano* v. *Priest* is correct. Plainly put, the rule is that the level of spending for a child's education may not be a function of wealth other than the wealth of the State as a whole. For convenience we shall refer to this as the principle of "fiscal neutrality," a reference previously adopted in *Serrano*.[1]

This Court will treat defendants' motion to dismiss as a motion for summary judgment in which, for the purposes here, plaintiffs' allegations of fact must be taken as true. These allegations will be supplemented by judicial notice of facts appearing in official public records and reports which have been stipulated to by the parties herein. The State has argued that the expiration of M.S.A. section 124.211 has rendered the complaint moot. If in fact the existing vacuum in "equalizing" State aids were to continue, the influence of district wealth variations would be even more extensive and invidious than what we are about to describe. In fact, the opposite is true; it has seriously aggravated the injury. In fairness to the State it shall be assumed—contrary to fact—that there presently continues in existence a system of subventions similar to the recently expired system.

The recently expired Minnesota system appears structurally indistinguishable in its basic parts from the California system described in the *Serrano* opinion, supra at 591–595. The Minnesota pupils—like those in *Serrano*—allege that the number of dollars per pupil spent in their school districts is a function of the amount of taxable wealth per pupil located within the boundaries of those districts and thus subject to the local educational levy. See M.S.A. chapter 124. School districts in Minnesota differ in taxable wealth per pupil. Indeed, some districts have almost no taxable wealth, while others range up to and even above $30,000 per pupil. The plaintiff children reside in relatively poor districts.[2]

The State has assisted the poorer districts with "equalizing" aid but in a manner which offsets only a portion of the influence of district wealth variations.[3] To be specific, in 1970–71 if a school district's tax rate were at least 20 mills, it was guaranteed a total of $404 spendable dollars by the State. Thus, if the local levy of 20 mills raised only $200 (in a district with $10,000 assessed valuation per pupil) the State supplemented this with a subvention of $204 per pupil. If the district was sufficiently wealthy that a 20-mill levy raised more than the $404 guarantee, it retained the excess collection and now has it available for expenditure. There appear to be a number of districts in this enviable position.

In addition the State has guaranteed to every district a minimum State subvention of $141 per pupil. Thus, a rich district which raised

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[1] The analysis here generally parallels that appearing in J. Coons, W. Clume, and S. Sugarman, "Private Wealth and Public Education" (Cambridge, Harvard University Press, 1970), hereinafter cited as "Private Wealth and Public Education."

[2] The rule adopted here and in *Serrano* does not depend upon the personal wealth of the pupils or their parents. It is sufficient that the plaintiffs be members of the larger class of pupils injured which class is defined as the pupil population of relatively poor school districts. *Serrano* v. *Priest*, 5 Cal. 3d at 601, ——P. 2d at ——. Whether "relative" poverty includes every district poorer than that one district richest in assessed valuation per pupil need not now be determined, nor would this appear to have great practical significance in the application of the general principle.

[3] The examples that follow in the text are all hypothetical applications of M.S.A. § 124.211.

$450 at the 20-mill rate may spend $591 per pupil. What is important about this flat grant is that it is useful only to the richer districts. Even if it were abolished, those districts poor in taxable wealth would receive no less than they now do, because the $141 is counted as part of the equalizing aid. As in our previous example, a poor district raising only $200 with the 20-mill local rate would receive its $204 from the State in "equalizing" money even if the $141 guaranteed minimum did not exist. Thus this latter guarantee acts in effect as a unique bonus solely for the benefit of rich districts.

Finally, insofar as districts exceed the 20-mill local tax rate (apparently all poor districts do) they are essentially on their own. For every additional mill on its local property a district with $20,000 valuation per pupil adds another $20 per child in spending; a district with $5,000 valuation per pupil adds only $5 in spending. Put another way, above 20 mills there is a high correlation per pupil wealth and the amount available to spend for education for the same mill rate.

To sum up the basic structure, the rich districts may and do enjoy both lower tax rates and higher spending. A district with $20,000 assessed valuation per pupil and a 40-mill tax rate on local property would be able to spend $941 per pupil; to match that level of spending the district with $5,000 taxable wealth per pupil would have to tax itself at more than three times that rate, or 127.4 mills.

There are apparently many minor refinements and subventions, none of which alter this essential pattern.[4] The overall conclusion is inescapable. The level of spending for publicly financed education in Minnesota is profoundly affected by the wealth of each school district. Children living in districts poorer than the richest are proportionately disadvantaged. It is this class which pupil plaintiffs claim to represent.

It may be true, of course, that not every difference in spending level is traceable into a difference in effectiveness of education. We must recognize that there has been disagreement among scholars over the degree to which money counts.[5] For present purposes, however, it is sufficient that the relation between cost and quality of education has been alleged. In any event, the legislature would seem to have foreclosed this issue to the State by establishing a system encouraging variation in spending: it would be high irony for the State to argue that large portions of the educational budget authorized by law in effect are thrown away. The courts that have considered the issue are in agreement.[6]

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[4] Defendants' contention that other categories of state aids substantially increase the revenue of many schools may raise a question of fact, i.e. whether the dependence on local school district wealth is overcome by these other aids. However, for purpose of this motion, we must accept as true plaintiffs' allegation of wealth dependence.

[5] The competing views are summed up in *Serrano* v. *Priest*, 5 Cal. 3d at 601, ——— P.2d at ——— (f.n. 16). It is noteworthy that, while Prof. James Coleman's earlier work is sometimes interpreted to question the cost-quality relation, his *foreword to Private Wealth and Public Education* suggests that spending differences are a significant factor in education.

[6] The cases are collected in the *Serrano* opinion at f.n. 16. 5 Cal. 3d at 601 ——— P.2d at ———.

Furthermore, this Court notes the affidavit of Van D. Mueller, attached to plaintiffs' brief in that it gives an indication of the correlation between spending per pupil and the quality of education. The statements made in the affidavit must, under the law, be taken as true for the purpose of determining whether plaintiffs have spelled out a cause of action. Mueller flatly states:

> The districts having the lowest per pupil expenditure, which are generally the poorest districts in terms of assessed valuation per pupil unit, offer an education that is inferior to the districts having the highest per pupil expenditures.

While the correlation between expenditure per pupil and the quality of education may be open to argument, the Court must assume here that it is high. To do otherwise would be to hold that in those wealthy districts where the per pupil expenditure is higher than some real or imaginary norm, the school boards are merely wasting the taxpayers' money. The Court is not willing to so hold, absent some strong evidence. Even those who staunchly advocate that the disparities here complained of are the result of local control and that such control and taxation with the resulting inequality should be maintained would not be willing to concede that such local autonomy results in waste or inefficiency.

The disparities demonstrated by the California court in *Serrano* stood out in bold relief, while the figures supplied by the Minnesota Department of Education tend to show a lack of such great disparities. Nevertheless, this Court must accept at face value the affidavit of Mueller which states that if the statistics for Minnesota are arranged in the same manner as in California, that is, dividing elementary and secondary school figures, the disparities are "very comparable." Thus, there is little or no difference between the factual allegations in this case and those in *Serrano*.

The U.S. Supreme Court has employed two distinct approaches to claims asserted under the equal protection clause of the 14th amendment. See, for example *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) and *McGowan* v. *Maryland*, 366 U.S. 420 (1961). These approaches involve substantially different degrees of deference for State legislation depending upon its subject matter and character. Most regulation by the States of most kinds of interests is judged merely by the rationality of the relation between the State's objective and the means of regulation (the statutory or administrative classifications) chosen. The Court does not ordinarily undertake to evaluate purposes and effects as such. This test of the relation of means to ends might plausibly be applied to the Minnesota system here attached. If the State's objective is a "general and uniform system" of education, as article VIII, sections 1 and 2 of the Minnesota constitution declare, it might be wondered whether the means chosen are rationally adapted to that goal.

However, this issue is not reached because, in the present case, the stricter test of equal protection is clearly more appropriate. This approach requiring close scrutiny of the State law by the Court is triggered whenever either a "fundamental interest" is at stake or the State has employed a "suspect classification." Here both such factors are involved and mutually reinforce the pupil plaintiffs' attack upon the system.

First, as to the specially protected interest: Where the onus of a legislative classification falls upon an interest which is classified as "fundamental," the State bears the burden of demonstrating a compelling interest of its own which is served by the challenged legislation and which cannot be satisfied by any other convenient legal structure.[7] That approach fits this case because the interest at stake is education. The *Serrano* opinion, *supra* at 604–610, has correctly inferred from relevant expressions of the U.S. Supreme Court and from the nature of education itself that this interest is truly fundamental in the constitutional sense.

It is unnecessary to repeat the persuasive analysis of the California court on this point, but it is worth observing that education in this respect is to be sharply distinguished from most other benefits and services provided by government.[8] It is not the "importance" of an asserted interest which alone renders it specially protected. One can concede the significance of welfare payments to an indigent and yet accept the result in *Dandridge* v. *Williams*, where the Court did not face a suspect classification.[9] Education has a unique impact on the mind, personality, and future role of the individual child. It is basic to the functioning of a free society and thereby evokes special judicial solicitude.[10]

Now we consider the relevance of the legislative classification. As noted above, the pupils' objection to the financing system is augmented by the nature of the classifying fact—district wealth—by which the distribution of education is affected and, in significant degree, determined. In a number of decisions over the last 15 years the U.S. Supreme Court has made it plain that classifications based upon wealth are suspect. These decisions, convincingly analyzed in *Serrano*,[11] are well known and need no comment here. What is important to note is that the objection to classification by wealth is in this case aggravated by the fact that the variations in wealth are State created. This is not the simple instance in which a poor man is injured by his lack of funds. Here the poverty is that of a governmental unit that the State itself has defined and commissioned. The heaviest burdens of this system surely fall de facto upon those poor families residing in poor districts who cannot escape to private schools, but this effect only magnifies the odiousness of the explicit discrimination by the law itself against all children living in relatively poor districts.

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[7] *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). See also *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963); *Harper* v. *Virginia Board of Elections*, 383 U.S. 66s (1966); *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969). The fundamental interest cases and the rationale of the correlative "compelling interest" test are considered at length in the *Serrano* opinion, 5 Cal. 3d at 604–611, —P. 2d at ——.

[8] And thus, incidentally, does not constitute an opening wedge for eventual fiscal neutrality in all government services through the medium of the 14th Amendment, *Serrano* v. *Priest*, 5 Cal. 3d at 613–614; Coones, Clune, and Sugarman, *Private Wealth and Public Education*, 414–419 (1970).

[9] 397 U.S. 471 (1970). See also *James* v. *Valtierra*, 402 U.S. 137 (1971). (The interest in housing). In another respect Valtierra actually supports the "fundamentality" of the interest in education. The Court there emphasized the special importance of the democratic process exemplified in local plebiscites. That perspective here assists pupil plaintiffs who ask no more than equal capacity for local voters to raise school money in tax referenda, thus making the democratic process all the more effective.

[10] Even the majority opinion in *Dandridge* seems to intimate this by its citation of the decision in *Shelton* v. *Tucker*, 364 U.S. 479 (1960) as the exemplar of the Court's commitment to a special view of equal protection in those areas where "freedom guaranteed by the Bill of Rights" may be affected. 397 U.S. at 484. In *Shelton*, Mr. Justice Stewart for the majority had declared that "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools", 364 U.S. a 487.

[11] Cal. 3d at 597–604. Elaborate analyses of these cases appear in Note, "Developments in the Law—Equal Protection", 82 *Harv. L. Rev.* 1065 (1969); Michelman, *"On Protecting the Poor Through the Fourteenth Amendment"* 83 *Harv. L. Rev.* (1969); *Private Wealth and Public Education*, 359–387.

This does not suggest that by itself discrimination by wealth is necessarily decisive. No court has so held. However, when the wealth classification affects the distribution of public education, the constitutional significance is cumulative.[12]

It cannot be argued that a quality education endows its recipient with a distinct economic advantage over his less educated brethren. By these standards the inexorable effect of educational financing system such as here maintained puts the State in the position of making the rich richer and the poor poorer. If added to this problem is the problem that the parents of children who live in poor districts have also a lower income than the parents in wealthier districts, then the disparity may be even more severe than that alleged by plaintiffs.

III

A State, of course, could have a powerful and legitimate interest in maintaining the strength of local government by preserving local choice in school spending. If that interest were "compelling"—and sufficiently so—and if because of some extremely important State need, it were necessary that only wealthy children be given quality education and that poor children be denied such, then the present financing structure might be justified. (See *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).) Whether this interest of the State is constitutionally compelling, however, need not be decided for two reasons. By its own acts, the State has indicated that it is not primarily interested in local choice in school matters. In fact, rather than reposing in each school district the economic power to fix its own level of per-pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes). To promote such an erratic dispersal of privilege and burden on a theory of local control of spending would be quite impossible.[13]

The second reason for ignoring the question of whether the State's interest is compelling is that, under the constitutional standard here adopted, if the State chooses to emphasize local control, it remains free to do so to whatever degree it wishes. In fact, it is the singular virtue of the *Serrano* principle that the State remains free to pursue all imaginable interests except that of distributing education according to wealth. The State makes the argument that what plaintiffs seek here is uniformity of expenditure for each pupil in Minnesota. Neither this case nor *Serrano* requires absolute uniformity of school expenditures. On the contrary, the fiscal neutrality principle not only removes discrimination by wealth but also allows free play to local effort and choice and openly permits the State to adopt one of many optional school funding systems which do not violate the equal protection clause.[14]

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[12] As with the conjunction of poverty and the voting interest in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), or poverty and the interest in access to appellate review as in *Griffin* v. *Illinois*, 351 U.S. 12 (1956).

[13] The *Serrano* opinion states the idea:

"We need not decide whether such decentralized financial decision-making is a compelling state interest, since under the present financing system, such fiscal freewill is a cruel illusion for the poor school district . . . . Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option . . ." 5 Cal. 3d at 611.

IV

The State argues that the issues here posed have been foreclosed by *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd *sub nom McInnis* v. *Oglivie*, 394 U.S. 322 (1969), and *Burress* v. *Wilkerson*, 310 F. Supp. 572 (W.D.Va. 1969) aff'd *nom.* 397 U.S. 74 (1970). It is true that the present complaint—like the two decisions noted—contained references to a duty of the State to respond to individual "needs" of pupils. It appears that plaintiffs herein have now abandoned this aspect of their claim. In any event such a claim is in fact foreclosed by *McInnis* and *Burress, supra*. These two decisions, however, do not speak to the issue here considered—whether there is a right to mere fiscal neutrality. As the *Serrano* decision makes clear, the Supreme Court left that issue open. See *Askew* v. *Hargrave*, 401 U.S. 476 (1971). The reasoning of the California court on this point is completely persuasive and this court adopts it as its own. *Serrano* v. *Priest*, *supra*, at 615–618.

V

Therefore, this court concludes that the allegations of the plaintiff childrens' complaint state a cause of action and that a system of public school financing which makes spending per pupil a function of the school district's wealth violates the equal protection guarantee of the 14th amendment to the Constitution of the United States. In accordance with the foregoing memorandum,

It is ordered that the motions of defendants to dismiss the action are denied.

The court will retain jurisdiction of the case but will defer further action until after the current Minnesota legislative session.

MILES W. LORD,
U.S. District Judge.

OCTOBER 12, 1971.

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[14] This Court in no way suggests to the Minnesota Legislature that it adopt any one particular financing system. Rather, this memorandum only recognizes a constitutional standard through which the Legislature may direct and measure its efforts. For an explication of some of the numerous school financing systems available which meet the equal protection standard, see Guthrie, Kleindorfer, Levin and Stout, *Schools and Inequality* (1971); Coons, Clune, and Sugarman *Private Wealth and Public Education* (1970), and "Education Opportunity: A Workable Constitutional Test for State Financial Structures," 57 Cal. L. Rev. 305 (1969).

U.S. DISTRICT COURT, DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-71 Civ. 243

Donald VAN DUSARTZ and Audrey Van Dusartz, individually and on behalf of all others similarly situated; et al., plaintiffs

versus

Rolland F. Hatfield, Auditor of the State of Minnesota, et al., Defendants

DISMISSAL

TO: John Mason, Solicitor General, and Douglas Skor, Special Assistant Attorney General, State Capitol, Saint Paul, Minnesota, attorneys for defendants.

WHEREAS:

On October 12, 1971, the court entered a memorandum and order in the above-entitled case denying defendants' motion to dismiss. In the order, the court indicated that jurisdiction would be retained pending the special session of the Minnesota Legislature which at the time was considering proposals for financing of public elementary and secondary education.

On October 30, 1971, chapter 31 of the Minnesota Extra Session Laws was approved. Said statute sets forth new formulae for providing State aid to elementary and secondary education.

Upon consideration of chapter 31, plaintiffs' attorneys have concluded that said statute may well not meet the strict constitutional standard set forth in the court's October 12 memorandum. However, it appears that the scheme set forth in the recent legislation is considerably closer to meeting the constitutional standard of fiscal neutrality than the previous statute which the court analyzed in its October 12 memorandum.

Further, plaintiffs' counsel are seeking an analysis of the effects of the current legislation on easing the disparities between rich and poor school districts. This analysis will not be available for several months, and the effects of the second-year financing scheme will not be known precisely for some time after that.

By its recent enactment, the legislature indicated that it was moving toward full acceptance of the principle expressed by the Court in its October 12 memorandum and by the California Supreme Court in *Serrano* v. *Priest*. The degree of acceptance of this principle in the short amount of time between the filing of these memorandums and the enactment of the legislation makes it appear to these plaintiffs to be particularly prudent to hold further constitutional challenges in abeyance until the Legislature has had a full session in which to consider completely the constitutional principles established by the court in the above-entitled case.

Therefore, please take notice that the above-entitled action is hereby dismissed without prejudice pursuant to rule 41.

ORDER FOR DISMISSAL

The Court being informed that defendants have no objection to the dismissal of the above-entitled case,

It is Ordered that the case be dismissed without prejudice and without costs to either party.

Miles W. Lord,
U.S. District Judge.

November 29, 1971.

RODRIGUEZ *v.* SAN ANTONIO

Civ. Action 68–175SA (W.D. Tex. 1971)

PER CURIAM

Pursuant to rule 23, Federal Rules of Civil Procedure, plaintiffs bring this action on behalf of Mexican-American schoolchildren and their parents who live in the Edgewood Independent School District, and on behalf of all other children throughout Texas who live in school districts with low property valuations. Jurisdiction of this matter is proper under 28 U.S.C. §§ 1331, 1343. This Court finds merit in plaintiffs' claim that the current method of State financing for public elementary and secondary education deprives their class of equal protection of the laws under the 14th amendment to the U.S. Constitution.[1]

Edgewood and six other school districts lie wholly or partly within the city of San Antonio, Tex. Five additional districts are located within rural Bexar County. All of these districts and their counterparts throughout the State are dependent upon Federal, State, and local sources of financing. Since the Federal Government contributes only about 10 percent of the overall public school expenditures, most revenue is derived from rural sources and from two State programs: the available school fund and the minimum foundation program. In accordance with the Texas constitution, the $296 million in the available school fund for the 1970–71 school year was allocated on a per capita basis determined by the average daily attendance within a district for the prior school year.

Costing in excess of $1 billion for the 1970–71 school year, the minimum foundation program provides grants for the costs of salaries, school maintenance, and transportation. Eighty percent of the cost of this program is financed from general State revenue with the remainder apportioned to the school districts in "the local fund assignment." Tex. Educ. Code Ann. arts. 16.71–16.73 (1969). Although generally measuring the variations in taxpaying ability, the economic index employed by the State to determine each district's share of "the local fund assignment" (Tex. Educ. Code Ann. arts. 16.74–16.78) has come under increasing criticism.[2]

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[1] See *Serrano* v. *Priest*, 5 Cal. 3d 584, —— P. 2d —— (1971); and *Van Dusartz* v. *Hatfield*, —— F. Supp. —— (D. Minn. 1971). Serrano convincingly analyzes discussions regarding the suspect nature of classifications based on wealth, and Van Dusartz points out that in this type case "the variations in wealth are state created. This is not the simple instance in which the poor man is injured by his lack of funds. Here the poverty is that of a government unit that the state itself has defined and commissioned."

[2] See "The Challenge and the Chance," Rpt. of the Governor's Comm. on Public School Educ. 58–68 (1968). The accuracy of the Economic Index is the subject of separate litigation in *Fort Worth Ind. School Dist.* v. *J. W. Edgar*, (N.D. Tex., Fort Worth Div.).

To provide their share of the minimum foundation program, to satisfy bonded indebtedness for capital expenditures, and to finance all expenditures above the State minimum, local school districts are empowered within statutory or constitutional limits to levy and collect ad valorem property taxes. Tex. Const. art. 7. §§ 3, 3a; Tex. Educ. Code Ann. art. 20.01, et seq. Since additional tax levies must be approved by a majority of the property-tax-paying voters within the individual district, these statutory and constitutional provisions require as a practical matter that all tax revenues be expended solely within the district in which they are collected.

Within this ad valorem taxation system lies the defect which plaintiffs challenge. This system assumes that the value of property within the various districts will be sufficiently equal to sustain comparable expenditures from one district to another. It makes education a function of the local property tax base. The adverse effects of this erroneous assumption have been vividly demonstrated at trial through the testimony and exhibits adduced by plaintiffs. In this connection, a survey of 110 school districts[2a] throughout Texas demonstrated that while the 10 districts with a market value of taxable property per pupil above $100,000 enjoyed an equalized tax rate per $100 of only 31 cents, the poorest four districts, with less than $10,000 in property per pupil, were burdened with a rate of 70 cents. Nevertheless, the low rate of the rich districts yielded $585 per pupil, while the high rate of the poor districts yielded only $60 per pupil. As might be expected, those districts most rich in property also have the highest median family income and the lowest percentage of minority pupils, while the poor property districts are poor in income and predominantly minority in composition.[3]

Data for 1967–68 show that the seven San Antonio school districts follow the statewide pattern. Market value of property per student varied from a low of $5,429 in Edgewood, to a high of $45,095 in Alamo Heights. Accordingly, taxes as a percent of the property's market value were the highest in Edgewood and the lowest in Alamo Heights. Despite its high rate, Edgewood produced a meager $21 per pupil from local ad valorem taxes, while the lower rate of Alamo Heights provided $307 per pupil.

Nor does State financial assistance serve to equalize these great disparities. Funds provided from the combined local-State system of financing in 1967–68 ranged from $231 per pupil in Edgewood to $543 per pupil in Alamo Heights. There was expert testimony to the effect that the current system tends to subsidize the rich at the expense of the poor, rather than the other way around. Any mild equalizing effects that State aid may have do not benefit the poorest districts.

For poor school districts, educational financing in Texas is, thus, a tax-more, spend-less system. The constitutional and statutory framework employed by the State in providing education draws distinction between groups of citizens depending upon the wealth of the district in which they live. Defendants urge this court to find that there is a reasonable or rational relationship between these distinctions or classifications and a legitimate State purpose. This rational basis test is normally applied by the courts in reviewing State commercial or economic regulation. See, for example, *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483 (1955). More than mere rationality is required, however, to maintain a State classification which affects a "fundamental interest" or which is based upon wealth. Here both factors are involved.

[2a] The total number of districts in the State is approximately 1,200.

[3] Plaintiffs' Exhibit VIII shows 1960 median family income of $5,900 in the top ten districts and $3,325 in the bottom four. The rich districts had eight per cent minority pupils while the poor districts were seventy-nine percent minority.

These two characteristics of State classification, in the financing of public education, were recognized in *Hargrave* v. *McKinney*, 413 F. 2d 320, 324 (5th Cir. 1969), *on remand*, *Hargrave* v. *Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970), vacated on other grounds sub nom., *Askew* v. *Hargrave*, 401 U.S. 476 (1971). Among the authorities relied upon to support the *Hargrave* conclusion "that lines drawn on wealth are suspect" is *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 668 (1965).[4] In striking down a poll tax requirement because of the possible effect upon indigent voting, the Supreme Court concluded that:

> . . . [l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored. . . . To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor.

Likewise *McDonald* v. *Bd. of Elections Comm'rs of Chicago*, 394 U.S. 802, 807 (1969), noted that:

> . . . a careful examination on our part is especially warranted where lines are drawn on the basis of wealth . . . which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.

Further justification for the very demanding test which this court applies to defendants' classification is the very great significance of education to the individual. The crucial nature of education for the citizenry lies at the heart of almost 20 years of school desegregation litigation. The oft repeated declaration of *Brown* v. *Bd. of Education*, 347 U.S. 483, 493 (1954), continues to ring true:

> Today, education is perhaps the most important function of State and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the Armed Forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms.

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[4] In addition, the court relied upon Douglas v. California, 372 U.S. 353 (1963), and Griffin v. Illinois, 351 U.S. 12 (1956), which are decisions invalidating state laws that discriminated against criminal defendants because of their poverty.

Because of the grave significance of education both to the individual and to our society, the defendants must demonstrate a compelling State interest that is promoted by the current classifications created under the financing scheme.

Defendants insist that the Court is bound by the opinions in *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd mem. sub. nom., 394 U.S. 322 (1969); and *Burrus* v. *Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), aff'd mem. sub. nom. 397 U.S. 44 (1970). However, we disagree.
when reviewing the complexities of a State educational financing

The development of judicially manageable standards is imperative scheme. Plaintiffs in *McInnis* sought to require that educational expenditures in Illinois be made solely on the basis of the "pupils' educational needs." Defining and applying the nebulous concept "educational needs" would have involved the court in the type of endless research and evaluation for which the judiciary is ill-suited.[5] Accordingly, the Court refused the claim that the equal protection clause of the 14th amendment demands such an unworkable standard. The subsequent affirmance, without opinion, by the Supreme Court would not, in our opinion, bar consideration of plaintiffs' claim that lines in Texas have been drawn on the basis of wealth. The same situation prevails with respect to *Burrus* where the Court, in referring to the "varying needs" of the students, found the circumstances "scarcely distinguishable" from *McInnis*.

In the instant case plaintiffs have not advocated that educational expenditures be equal for each child.[6] Rather, they have recommended the application of the principle of "fiscal neutrality." Briefly summarized, this standard requires that the quality of public education may not be a function of wealth, other than the wealth of the State as a whole. Unlike the measure offered in *McInnis*, this proposal does not involve the Court in the intricacies of affirmatively requiring that expenditures be made in a certain manner or amount. On the contrary, the State may adopt the financial scheme desired so long as the variations in wealth among the governmentally chosen units do not affect spending for the education of any child

Considered against this principle of "fiscal neutrality," defendants' arguments for the present system are rendered insubstantial. Not only are defendants unable to demonstrate compelling State interests for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications. They urge the advantage of the present system in granting decisionmaking power to individual districts, and in permitting local parents to determine how much they desire to spend on their children's schooling However, they lose sight of the fact that the State has, in truth and in fact, limited the choice of financing by guaranteeing that "some districts will spend low (with high taxes) while others will spend high (with low taxes)."[7] Hence, the present system does not serve to promote one of the very interests which defendants assert

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[5] Difficulties in defining the term are discussed at note . 293 F. Supp. 329.

[6] Indeed, it is difficult to see how the defendants reach a contrary conclusion since even the McInnis plaintiffs did not request precisely equal expenditures per child.

[7] As the Court said in Van Dusartz v. Hatfield, supra, note 1: "By its own acts, the State has indicated that it is not primarily interested in local choice in school matters. In fact, rather than reposing in each school district the eco-

Indicative of the character of defendants' other arguments is the statement that plaintiffs are calling for "socialized education." Education, like the Postal Service has been socialized, or publicly financed and operated almost from its origin. The type of socialized education, not the question of its existence, is the only matter currently in dispute. One final contention of the defendants however calls for further analysis. In essence, they argue that the State may discriminate as it desires so long as Federal financing equalizes the differences. Initially, the Court notes that plaintiffs have successfully controverted the contention that Federal funds do, in fact, compensate for State discrimination.[8] More importantly, defendants have not adequately explained why the acts of other governmental units should excuse them from the discriminatory consequences of State law. *Hobson* v. *Hansen*, *supra*, 269 F. Supp. at 496, countered defendants' view by finding that the Federal aid to education statutes:[9]

> . . . are manifestly intended to provide extraordinary services at the slum schools, not merely to compensate for inequalities produced by local school boards in favor of their middle-income schools. Thus, they cannot be regarded as curing any inequalities for which the Board is otherwise responsible.

Since they were designed primarily to meet special needs in disadvantaged schools, these funds cannot be employed as a substitute for State aid without violating the congressional will. Further support for this view is offered by a series of decisions prohibiting deductions from State aid for districts receiving "impacted areas" aid.[10] Performance of its constitutional obligations must be judged by the State's own behavior, not by the actions of the Federal Government.

While defendants are correct in their suggestion that this court cannot act as a "superlegislature," the judiciary can always determine that an act of the legislature is violative of the Constitution. Hav-

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nomic power to fix its own level of per pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes). To promote such an erratic dispersal of privilege and burden on a theory of local control of spending would be quite impossible"

[8] Plaintiffs' Exhibit 8, Table X, indicates that while Edgewood receives the highest Federal revenues per pupil of any district in San Antonio, $108, and Alamo Heights, the lowest, $36, the former still has the lowest combined local-State-Federal revenues per pupil, $356, and the latter the highest, $594.

[9] The statutes involved were the Economic Opportunity Act, 42 U.S.C. §§ 2781–2791 (1964); the Elementary and Secondary Education Act, 20 U.S.C. §§ 241a–411 (1970 Supp.), and federally impacted areas aid, 20 U.S.C. §§ 236–244 (1964), *as amended*, (1970 Supp.).

[10] These cases have held that the statute clearly provides that the aid is intended as special assistance to local educational agencies, and that to permit a reduction in state aid would violate the Congressional intent. Douglas Ind. School Dist. No. 3 v. Jorgenson, 293 F. Supp. 849 (D. S.D. 1968); Mergenreter v. Hayden, 295 F. Supp. 251 (D Kan. 1968); Shepheard v. Godwin, 280 F. Supp. 869 (E.D. Va. 1968); Carlsbad Union School Dist. v. Rafferty, 300 F. Supp. 434 (S.D. Cal. 1969), *aff'd*, 429 F. 2d 337 (9th Cir. 1970), and Triplett v. Tiemann, 302 F. Supp. 1244 (D. Neb. 1969). After these actions arose, the statute was amended to prohibit aid to schools in any state which has "taken into consideration payments under this subchapter in determining the eligibility of any local educational agency in that State for State aid . . . ." 20 U.S.C. §§ 240 (d) (2) (1969).

ing determined that the current system of financing public education in Texas discriminates on the basis of wealth by permitting citizens of affluent districts to provide a higher quality education for their children, while paying lower taxes, this court concludes, as a matter of law, that the plaintiffs have been denied equal protection of the laws under the 14th amendment to the U.S. Constitution by the operation of article 7, section 3 of the Texas constitution and the sections of the education code relating to the financing of education, including the minimum foundation program.

Now it is incumbent upon the defendants and the Texas Legislature to determine what new form of financing should be utilized to support public education.[11] The selection may be made from a wide variety of financing plans so long as the program adopted does not make the quality of public education a function of wealth other than the wealth of the State as a whole.

Accordingly, It is ordered that:

> 1. The defendants and each of them be preliminarily and permanently restrained and enjoyed from giving any force and effect to said article 7, section 3 of the Texas constitution, and the sections of the Texas education code relating to the financing of education, including the Minimum Foundation School Program Act (ch. 16), and that defendants, the commissioner of education and the members of the State board of education, and each of them, be ordered to reallocate the funds available for financial support of the school system, including, without limitation, funds derived from taxation of real property by school districts, and to otherwise restructure the financial system in such a manner as not to violate the equal protection provisions of both the United States and Texas constitutions;
>
> 2. The mandate in this cause shall be stayed, and this court shall retain jurisdiction in this action for a period of 2 years in order to afford the defendants and the legislature an opportunity to take all steps reasonably feasible to make the school system comply with the applicable law; and without limiting the generality of the foregoing, to reallocate the school funds, and to otherwise restructure the taxing and financing system so that the educational opportunities afforded the children attending Edgewood Independent School District, and the other children of the State of Texas, are not made a function of wealth, other than

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[11] On October 15, 1969 this Court indicated its awareness of the fact that the Legislature of Texas, on its own initiative, had authorized the appointment of a committee to study the public school system of Texas and to recommend "a specific formula or formulae to establish a fair and equitable basis for the division of the financial responsibility between the State and the various school districts of Texas". It was then felt that ample time remained for the committee to "explore all facets and all possibilities in relation to the problem area", in order for appropriate legislation to be enacted not later than the adjournment of the 62d Legislature, and since the legislature appeared ready to grapple with the problems involved, the trial of this cause was held in abeyance pending further developments. Unfortunately, however, no action was taken during the 62d Session which has adjourned. Hopefully, the Governor will see fit to submit this matter to one or more special sessions so that members of the legislature can give these complex and complicated problems their undivided attention.

the wealth of the State as a whole, as required by the equal protection clause of the 14th amendment to the U.S. Constitution. In the event the legislature fails to act within the time stated, the court is authorized to and will take such further steps as may be necessary to implement both the purpose and the spirit of this order. See *Swann* v. *Adams*, 263 F. Supp. 225 (S.D. Fla. 1967); *Klahr* v. *Goddard*, 254 F. Supp. 997 (D. Ariz. 1966). Needless to say, the court hopes that this latter action will be unnecessary.

GOLDBERG
U.S. Circuit Judge.
SPEARS
Chief U.S. District Judge.
ROBERTS
U.S. District Judge.

DECEMBER 23, 1971.

ROBINSON *v.* CAHILL

Civ. Action L–18704–69 (Sup.Ct. N.J. 1972)

OPINION

DECIDED—JANUARY 19, 1972

Mr. Harold J. Ruvoldt, Jr., for plaintiffs (Messrs. Ruvoldt and Ruvoldt, attorneys).

Mr. Stephen G. Weiss,* for defendants (Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney).

Messrs. William J. Bender and *Frank Askin* filed a brief *amicus curiae* on behalf of the Education Committee of the National Association for the Advancement of Colored People, Newark Chapter, and the American Civil Liberties Union of New Jersey (*Messrs. David G. Lubell* and *Paul Trachtenberg* of the New York Bar, of counsel).

Mr. Melville D. Miller, Jr., Staff Attorney, State Office of Legal Services, Department of Community Affairs, filed a brief *amicus curiae* on behalf of the poor of New Jersey (Mr. Carl Bianchi, attorney).

Mr. Robert A. Coogan filed a brief *amicus curiae* on behalf of Gerald K. Loeb (Messrs. Saling, Moore, O'Mara and Coogan, attorneys).

BOTTER, J. S. C.

This action challenges the constitutionality of the system of financing elementary and secondary public schools of New Jersey. The case is similar to cases in other States, such as California, Minnesota, and Texas, where conflict with the 14th amendment equal protection clause was asserted recently.[1]

Also present are questions of State constitutional law: namely, whether the equal protection and education clauses of the State constitution are violated by New Jersey's statutory financing scheme.

Plaintiffs in this action include residents, taxpayer, and officials of Jersey City, Paterson, Plainfield, East Orange, and the township of Berlin (Camden County).[2] They assert claims on behalf of all persons in New Jersey who have similar interests. Defendants include branches of State government and State officials who have or may have functions to perform in the enactment or administration of laws dealing with education and State financing.

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* Mr. Weiss was an Assistant Attorney General when this action was commenced and has continued with the case as Special Counsel.

[1] *Serrano* v. *Priest*, 5 *Cal.* 3d 584, 487 *P.* 2d 1241 (Sup. ct. 1971) ; *Van Dusartz* v. *Hatfield*, — *F. Supp.* — (D. Minn. 1971) ; and *Rodriguez* v. *San Antonio Independent School District*, — *F. Supp.* — (W.D. Texas 1971).

[2] Richard F. McCarty of the Township of Berlin joined as a party plaintiff in lieu of proceeding with a similar action in Camden County. Counsel for plaintiffs in a recently commenced action in Monmouth County, *Loeb* v. *Rover*, filed a brief here as *amicus curiae*.

The system of financing public education in New Jersey relies heavily on local property taxes. It produces wide disparities in educational expenditures. Plaintiffs contend that public school education is a State function which must be afforded to all pupils on equal terms. They contend that a "thorough" education is afforded to some pupils but denied to others, and that the system discriminates also against property owners who are taxed at different rates throughout the State for the same public purpose.[3]

The Attorney General, defending the constitutionality of our State statutes, concedes that differences in expenditures exist, and that inadequacies are present in some schools. He contends, however, that the statutory system is constitutional; that the "State School Incentive Equalization Aid Law," commonly known as the Bateman Act,[4] will increase State aid for certain deprived districts and will greatly reduce discrepancies caused by district wealth variations; that unequal expenditures do not necessarily prove unequal education; and that local control and responsibility to meet various interests justify the present system of shared funding. The court is urged to defer to the legislature's judgment in an area as complex as education.

Public schools are financed primarily by local real property taxes augmented by various forms of "State aid," such as "formula aid," transportation aid, school building aid, lunch aid, et cetera, and Federal aid. When this action was commenced in 1970, the State school aid law of 1954, as amended, was in effect. *N.J.S.A.* 18A:58-1 *et seq.*; L. 1954, c. 85, as amended. This law included a "foundation program" consisting principally of minimum aid plus equalization aid, referred to as "formula aid" because it is based on a formula.

Under the foundation program formula each district received equalization aid of $400 per pupil less its "local fair share," and in any case not less than $75 (minimum aid) per pupil. *N.J.S.A.* 18A:58-5. Cities with population over 100,000 (Newark, Jersey City, Paterson, Camden, Trenton, and Elizabeth) received an additional $27 per pupil (*N.J.S.A.* 18A:58-6.1; L. 1966, c. 31); and, by virtue of *N.J.S.A.* 18A:58-6.2 (L. 1968, c. 301) all districts received another $25 per pupil. Local fair share was defined as the equivalent of the amount of revenue that could be raised locally with a tax rate of $1.05 per $100 of equalized valuations ($10\frac{1}{2}$ mills per dollar). *N.J.S.A.* 18A:58-4.

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[3] Plaintiffs had also asserted a claim of *de facto* discrimination based on race or color, seeking changes in school district boundaries. This aspect of the case was severed by stipulation and will be dismissed voluntarily, but without prejudice, if plaintiff's principal attack on the financing system is upheld. A similar claim was asserted in *Spencer* v. *Kugler*, 326 *F. Supp.* 1235 (D. N.J. 1971). The court dismissed that action and an appeal is pending.

[4] Enacted October 26, 1970, effective July 1, 1971, L. 1970, c. 234. This law adopted most of the recommendations of the State Aid to School Districts Study Commission, whose chairman was State Senator Raymond H. Bateman of Somerset County. The Commission's report, dated December 19, 1968, is referred to as the *Bateman Report*. The Commission was created by L. 1966, c. 32. There is now a Permanent Commission on State School Support, *N.J.S.A.* 52:N9-1 *et seq*, L. 1970, c. 233.

Equalized valuations is the term applied to the true market value of taxable real property in a district as determined by the State director of the division of taxation through studies of recent sales. *N.J.S.A.* 54:1–35.1 *et seq.* Under this law, aggregate assessments in each taxing district are adjusted to produce an equalized or true market value for the district. See *In re Appeals of Kents 2124 Atlantic Ave., Inc.*, 34 *N.J.* 21, 26–27 (1961). Equalized valuations are used to establish uniformity in the distribution of State aid despite unequal assessing practices. *See Switz* v. *Middletown Twp.*, 23 *N.J.* 580, 586 (1950).

Thus, under the foundation program, every district received per pupil, $100, plus the difference, if any, between $325 and the local fair share (plus $27, if the district was one of the six largest cities). By 1969–70, however, every school district in the State had annual budgets which exceeded the level "guaranteed" by the foundation program. The statewide average was over $800 per pupil. Today, 2 years later, the statewide average current expense per pupil is $1,009. All districts, therefore, had to finance the excess expenditure by local taxes, in addition to the local fair share. Some districts, of course, whose local fair share was high, received only the minimum aid of $100 per pupil.

Our principal concern is the Bateman Act which was passed while this action was pending. The complaint was amended to bring that act under attack. However, the foundation plan is still relevant because the legislature funded the Bateman Act for 1971–72 at a "20-percent" level, defined as that amount which would have been paid in 1971–72 under the foundation plan, plus 20 percent of the difference between that aid and Bateman Act aid if Bateman were fully funded. *N.J.S.A.* 18A: 58–18.1. For next year, 1972–73, this ratio has been raised to 40 percent L. 1971, c. 335, adopted December 7, 1971.

The details of the Bateman Act will be discussed later. This introduction is simply to show that the increase in formula aid under the Bateman Act in the first year has been negligible in most districts. Some poor districts received significant increases, however, especially those who benefited by the weighting factor in the formula for AFDC children (aid to families with dependent children).[5] However, relatively few school districts had an increase of $50 or more per pupil in 1971–72. Among the larger increases were $67.48 for Asbury Park, $80.41 for Camden, $109.82 for Newark, $98.51 for Trenton, and $54.58 for Jersey City. The largest increase was $115.95 for Winfield Township, the poorest district in taxable property per pupil. Thus, under the present law school districts continue to raise the bulk of their funds by local taxes. On a statewide basis local taxes pay for about 67 percent of public school costs, Federal aid is about 5 percent, and the balance (28 percent) comes from State funds.

In 1971–72 the principal items of State aid allocable to current expenses—formula aid under Bateman ($245,013,900), State transportation aid ($31,270,200), atypical pupil aid ($32,688,900), school lunch ($6,500,000), and vocational education aid ($3,479,000)—constitute approximately 21 percent of the aggregate of all current expenses. Current expenses for all districts are approximately $1.5 billion.[6]

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[5] *Bailey v. Engelman*, 56 *N.J.* 54 (1970) describes the nature and statutory basis of the AFDC program, at p. 56.

Fully funded and implemented, the Bateman Act would significantly improve upon the foundation plan in equalizing local revenue-raising power. However, school costs have been increasing at a rate of approximately 10 percent per year. The average increase is close to $100 per pupil annually. See Basic Statistical Data of New Jersey School Districts, Bulletin A71–2 (July 1971), published by the New Jersey Education Association, hereinafter referred to as NJEA Bulletin, at page 14. Thus, increases in Bateman formula aid at "20 percent" increments per year will not offset the annual rise in school costs except, possibly, in a few districts. Accordingly, the statistics in schedule A, annexed hereto, based in part on pre-Bateman data and in part on post-Bateman data, furnish a reasonable basis for evaluating the present system.

I. The School System

> There is also an artificial aristocracy, founded on wealth and birth . . . The artificial aristocracy is a mischievous ingredient in government, and provision should be made to prevent its ascendency.
>
> . . . At the first session of our legislature (in Virginia) after the Declaration of Independence, we passed . . . laws, drawn by myself, (which) laid the ax to the foot of pseudo-aristocracy. And had another which I prepared been adopted by the legislature, our work would have been complete. It was a bill for the more general diffusion of learning. This proposed to divide every county into wards . . . like your townships; to establish in each ward a free school for reading, writing and common arithmetic; to provide for the annual selection of the best subjects from these schools, who might receive at the public expense, a higher degree of education at a district school . . . Worth and genius would thus have been sought out from every condition of life and completely prepared by education for defeating the competition of wealth and birth for public trusts.
>
> —*Thomas Jefferson*,
> in a letter to John Adams, 1813.[7]

There are approximately 600 separate school districts in the State. Approximately 300 operate elementary schools only; approximately 200 districts operate a complete sysetm of elementary and secondary schools; and 45 districts operate secondary schools only (such as seven to 12 or nine to 12). The balance includes 21 nonoperating districts (sending pupils to other districts and paying tuition), 20 county vocational districts, and three districts that operate special classes only for handicapped children.

There are 51 type I districts (N.J.S.A. 18A:9–2); the remainder, including regional (N.J.S.A. 18A:13–1 to 50), and consolidated (N.J.S.A. 18A:8–25 to 41) school districts, are type II districts (N.J.S.A. 18A:9–3). In a type I district, members of the board of education are appointed by the chief executive officer of the municipality. N.J.S.A. 18A:12–7. In a type II district they are elected by the public at an annual school election. N.J.S.A. 18A:12-11. In all districts the board of education proposes the annual school budget. It is then submitted for approval to the voters at the school election in a type II district (N.J.S.A. 18A:22-23), or to the board of school estimate in a type I district (N.J.S.A. 18A:22-7).[8] If rejected by the voters in a type II district, the governing body must fix the budget. In a type I district, the board of school estimate may reject the proposed budget by certifying a lesser amount of money to the governing body. The municipal governing body must aprpopriate the amount certified, unless it exceeds 1½ percent of assessed valuations, in which case a lesser sum may be fixed. N.J.S.A. 18A:22-15, 17.[9] See *Board of Education of City of Elizabeth* v. *City Council of the City of Elizabeth*, 55 N.J. 501 (1970); *Board of Education of the Township of East Brunswick* v. *Township of East Brunswick*, 48 N.J. 94 (1966).

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[6] Other significant State appropriations in 1971–72 going toward local school costs are approximately $116 million for the teachers' pension fund and $30.5 million for school building aid.

[7] Brown, Stuart G., ed., *We Hold These Truths*, Harper & Brothers (New York: 1941), pp. 114–116.

If the budget adopted by the governing body in a type I or type II district is less than that proposed by the board of education, that board may appeal to the commissioner. The commissioner may then restore part or all of the budget cuts "within the limits originally proposed by the board of education" if he finds those funds are necessary to assure a "thorough and efficient" school system. See *East Brunswick* case, supra, 48 N.J. at p. 107. In no case has the commissioner fixed a budget which exceeded the local board's proposed budget, although he may have the power to do so.[10]

The State board of education has overall control and supervision of public school education in the State (N.J.S.A. 18A:4-10), and is authorized to adopt rules and regulations for carrying out the State school laws, N.J.S.A. 18A:4-15. The commissioner is the chief executive officer of the State department of education. He is the agent of the State board for all purposes. N.J.S.A. 18A:4-22. N.J.S.A. 18A:33-1 requires each school district to provide educational facilities and courses of study suited to the "ages and attainments" of all pupils. Our State constitution requires a "thorough and efficient" system of education. Article VIII, section IV, paragraph 1. With these provisions in mind, the Supreme Court in the *City of Elizabeth* case, supra, 55 N.J. at p. 506 said:

> Thus it is the duty of the commissioner to see to it that every district provides a thorough and efficient school system. This necessarily includes adequate physical facilities and educational materials, proper curriculum and staff, and sufficient funds.

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[8] The board of school estimate is composed of the mayor and two other members of the municipal governing body and two members of the board of education. *N.J.S.A.* 18A:22-1.

[9] By 1969 aprpoximately 75% of all type I districts had school budgets which exceeded 1½% of assessed valuations. New Jersey Urban School Development Council. *The Status of Equal Educational Opportunity in New Jersey's Model Cities*, p. 202 hereinafter referred to as *N. J. Model Cities Report*.

[10] An early phase of this action concerned Jersey City's 1970-71 budget. The governing body had provided a "caretaker" budget which did not include money for teachers' salaries. An appeal was taken by the board of education to the State Commissioner. He raised the budget to the amount originally requested by the local board. This court then entered an order, on defendants' application, compelling Jersey City to raise its share in accordance with the mandate of the Commissioner.

The State board has adopted regulations which offer consulting services for the purpose of improving elementary school programs. However, no minimum curriculum or standards of achievement for elementary schools have been fixed by regulations, although authorized by statute. N.J.S.A. 18A : 4–25. State control of instructional standards is exercised largely through certification of teachers and investigation of facilities and programs by the office of the county superintendent. The county superintendent is appointed by the Commissioner with approval of the State board. N.J.S.A. 18A : 7–1.

More control is exercised over secondary education. Local boards of education must develop a high school program and submit it to the State board for approval. N.J.S.A. 6 : 27–4a. The program must be found sufficient to meet the needs of students to "stimulate each pupil to achieve the highest level of attainment of which he is capable." N.J.A.C. 6 : 27–4d. State regulations also require adequate staff, equipment, and facilities and teaching loads that permit "a reasonable amount of attention . . . to the individual needs of the pupils." N.J.A.C. 6 : 27–8b.

The Commissioner has the power to direct the abandonment of part or all of a school building and to order alterations. N.J.S.A. 18A:20-36. The Commissioner, through county superintendents, has the power to withhold State aid from any district which does not provide suitable facilities and courses of study. N.J.S.A. 18A:33-2. However, the Commissioner has used these powers sparingly. Withholding State aid compounds problems whose major source is inadequate funds in the first place. Closing outmoded school buildings without the funds to build a replacement presents practical difficulties. What will you do with the children? On rare occasions the Commissioner has condemned a high school program as totally inadequate. In one case this resulted in the formation of a regional district of adequate size and efficiency.

But the net of practical considerations is that the quality of education has been left largely in local hands. Local school boards and municipal officials obviously consider not only educational needs but also the sentiment of the taxpaying public. School budget rejections by voters are commonplace. In 1969 a record number of budgets were rejected; namely, 170 of 524, or 32.4 percent. New Jersey Model Cities Report, supra, at page 205. Also, bonds for construction of school facilities have been voted down in 41 percent of all elections in 1969–70. Harold P. Seamon, Jr., "Bond Sales for Public School Purposes in New Jersey," School Board Notes (Sept./Oct. 1971) at page 20. As a practical matter, therefore, budgets fixed by local boards have restrained the Commissioner's enforcement of our constitutional and statutory requirements for a thorough education. Local property taxing power is the primary force under public school education in our present system.

II. Fiscal Comparisons

> The people of this State constitute a commonwealth, and in the prosperity of this commonwealth all the citizens have an equal interest. . . .
>
> New Jersey recognizes the wisdom of this in assessing a uniform rate of tax upon each citizen for the support of her schools, in proportion to the amount of property he possesses, and in apportioning

> the amount thus raised to the several school districts on the basis of their school census. . . .
>
> Every true man . . . should be proud of his State. . . . He should rejoice to see all her children receive an education, whether they live in counties made wealthy by cities and by concentrated manufacturing industries, or in those still poor, with their primitive forests. If he has wealth, he should willingly give his share for the education of the children of the poor . . .
>
> ELLIS A. APGAR,
> *State Superintendent of Public Instruction.*
> "N.J. School Report," 1878.

The financial effects of our present system are shown in appendix A. Appendix A includes approximately 25 percent of all operating districts in the State. Statewide averages and total enrollment are shown on the first line of page 1. Districts are arranged in each county in the order of highest to lowest in per pupil equalized valuations. The most recent data (1971–72) have been used where available. Some data which is 2 years old (1969–70) had to be used because more current data were not available. For example, teachers' salaries per pupil are 1969–70 figures. Since expense-per-pupil figures are for 1971–72, teachers' salary costs must be increased by approximately 20 percent because of inflation in order to correlate teachers' salary costs with current expenses. See NJEA Bulletin, page 14.

Districts listed in schedule A include in most cases the highest and lowest in equalized valuations per pupil in each county, and a random sampling of districts in between, and one or two regional districts (col. 1). Current expense per pupil, 1971–72 (col. 2), includes the cost of instruction, administration, transportation, maintenance, fixed charges (such as insurance costs and pension contributions), and certain sundry accounts. Debt service is not included. (Total statewide debt service in 1971 is estimated at $130 million, or $87 per pupil.) Professional staff per 1,000 weighted pupils, 1969–70 (col. 5), does not use the weighting formula of the Bateman Act; it uses the weighting formula in the NJEA Bulletin, page 18, which is slightly lower and does not include a weighting factor for AFDC children. Professional staff includes special services, guidance and supervisory personnel, and administrator, equated to full-time positions. Equalized school tax rate (col. 8) is the school tax levied (including any debt service payable by the municipality in type I districts) using equalized valuations. The sources of this data are noted below.[11]

The most obvious aspect of appendix A is district-to-district diversity. However, diversity alone may not prove differences in the quality of education. Many factors may account for differences in expenditure. Districts spend more for high school than elementary school programs; variations in the cost of living across the State may affect the cost of education; districts vary in size (Greater Egg Harbor Regional High School district is over 339 square miles while Victory Gardens in Morris County is 0.14 square miles). Transportation costs and certain fixed costs and capital expenditures may represent a higher per pupil expense in one district than another. Other factors may affect efficiency and costs, so that higher costs will not always connote better education. Moreover, differences in class size (as reflected in col. 3 of app. A) may not appreciably affect the quality of education. Nor is teacher performance necessarily a direct reflection of his or her salary level.

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[11] Data in columns 1, 2 and 7 was furnished by the State Department of Education; data in columns 10 and 11 comes from records of the State Department of Education; column 3 was compiled from data in the *Nineteenth Annual Report of the Commissioner;* and columns 4, 5, 6, 8 and 9 are from the *NJEA Bulletin.*

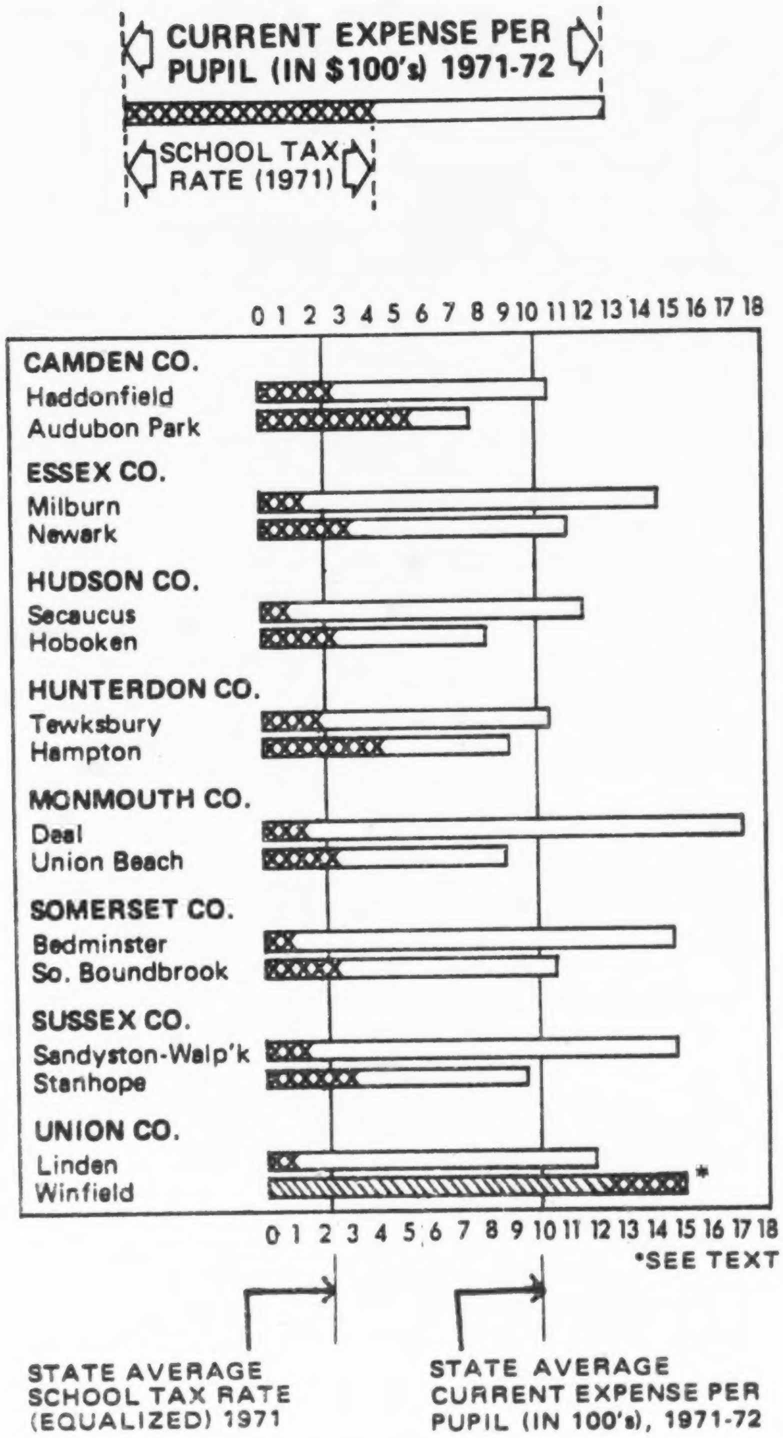
Nevertheless, appendix A shows a distinct pattern in every county in the State. In most cases, rich districts spend more money per pupil than poor districts; rich districts spend more money on teachers' salaries per pupil; rich districts have more teachers and more professional staff per pupil; and rich districts manage this with tax rates that are lower than poor districts, despite "equalizing" aid. The same conclusion was reached by Engelhardt, Engelhardt & Leggett, education consultants to the Committee To Study the Next Steps of Regionalization and Consolidation in the School Districts of New Jersey, a Pilot Study of School District Reorganization (1968), pages 26–27, hereinafter called pilot study. (The foregoing committee was appointed in 1967, pursuant to resolution of the State board of education. The committee's report of April 1969 is referred to as the Mancuso report, after Ruth H. Mancuso, chairman.) The pilot study at page 26 also reports that there was a "direct relationship between equalized value per pupil and median teachers' salaries" with median salaries ranging significantly when valuations per pupil exceeded $35,000 in 1965.

Figure I (p. 536) illustrates the relationship between valuations and expenditures per pupil and the inverse relationship between expenditures and tax rates. Figure I shows that districts with high valuations spend more money per pupil on education, but have lower tax rates, nevertheless. The poorest district in the State in valuations per pupil, Winfield Township, is the last district depicted on the chart. Its bar is shaded differently to show a tax rate which exceeds in length that portion of the bar which represents expenditures per pupil.

Other characteristics tend to vary directly with valuations. Thus, with a $1.43 school tax rate compared to $3.69 in Newark, Millburn has more teachers per pupil than Newark, spends more for teachers' salaries (1967–70) per pupil ($685 to $454) and has more professional staff per weighted pupil (61 to 53). In Camden County, Haddonfield, and Audubon Park compare as follows: 18.9 to 27.2 pupils per teacher, $478 to $293 in teachers' salaries (1969–70) per pupil and 55 to 44 in professional staff per 1,000 weighted pupils. Thus, Haddonfield gets more with a $2.33 tax rate than Audubon Park with a $5.69 tax rate. In Monmouth County, Deal, and Union Beach compare as follows: 14.8 to 26 pupils per teacher, $717 to $328 in teachers' salaries (1969–70) per pupil, and 74 to 42 in professional staff per 1,000 weighted pupils. Both are K–8 districts.

Winifield Township in Union County is only 0.17 square mile in area. It has the lowest equalized valuations per pupil in the State; namely, $3,921. Despite this, its current expense per pupil for 1971–72 is $1,253, which is well above the State average. This includes approximately $500 per pupil in State aid. In 1971, the equalized school tax rate was $15.11 and the total equalized municipal tax rate was $20.14. This represents an extraordinary tax effort. It means that a taxpayer in Winfield Township pays an amount equal to the value of his resi-

FIGURE I


CURRENT EXPENSE PER PUPIL (IN $100's) 1971-72
SCHOOL TAX RATE (1971)
0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
CAMDEN CO.
Haddonfield
Audubon Park
ESSEX CO.
Milburn
Newark
HUDSON CO.
Secaucus
Hoboken
HUNTERDON CO.
Tewksbury
Hampton
MONMOUTH CO.
Deal
Union Beach
SOMERSET CO.
Bedminster
So. Boundbrook
SUSSEX CO.
Sandyston-Walp'k
Stanhope
UNION CO.
Linden
Winfield
*
0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
*SEE TEXT
STATE AVERAGE SCHOOL TAX RATE (EQUALIZED) 1971
STATE AVERAGE CURRENT EXPENSE PER PUPIL (IN 100's), 1971-72

dence every 7 years just to raise money for school purposes, or every 5 years to raise money for school and all other municipal services. (A tax rate in excess of 4 percent is considered counterproductive since investors can own property elsewhere at lower rates. Higher tax rates may become confiscatory.)

Winfield Township was incorporated by L. 1941, c. 360, composed of land lying in part in the city of Linden and, in part, the township of Clark. Certain other small districts which have been created by legislative action also appear to be disadvantaged economially. Victory Gardens in Morris County (0.14 square mile), incorporated by L. 1951, c. 259, has $13,023 in equalized valuations per pupil; and Audubon Park in Camden County (0.15 square mile), incorporated by L. 1947, c. 418, has $4,596 in equalized valuations per pupil. Their respective current expenses are $999 and $771 per pupil; in 1971, they had equalized school tax rates of $4.52 and $5.59 respectively. There was no evidence offered at trial directed specifically to these small districts. However, counsel have stipulated that a brief description of the origin of Winfield Township as revealed in an unpublished study may be included in the record.[12]

The statewide spectrum of valuations and expenditures can be shown best, perhaps, by looking at the total number of pupils in various ranges, regardless of location. The following tables speak for themselves (county vocational and special class districts have been omitted):

TABLE I.—VALUATIONS PER PUPIL

Equalized valuations per pupil	Number of districts	Number of pupils
Below $10,000	4	10,593
$10,000 to $20,000	38	170,125
$20,000 to $30,000	107	287,490
$30,000 to $35,000	59	152,239
$35,000 to $40,000	64	151,419
$40,000 to $45,000	55	212,797
$45,000 to $50,000	68	168,109
$50,000 to $60,000	60	147,986
$60,000 to $90,000	81	163,044
$90,000 plus	42	21,485

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[12] Winfield Township was studied in 1946 by Robert K. Merton, Patricia S. West, and Marie Jahoda of the Bureau of Applied Social Research, Columbia University. It was chosen because of the intense community and political life of its residents which developed in part by choice and in part because of problems confronting them at the outset. The following description of its origins is taken from this study entitled, "Patterns of Social Life—Explorations in the Sociology and Social Psychology of Housing." Winfield Township was built as a mutual ownership community with federal funds furnished under the Lanham Act. It was a "workers community" sponsored by an industrial union of shipyard workers in cooperation with the Federal Works Agency.

The development encompassed approximately 110 acres. Originally there were 700 families housed in 250 buildings, most of which were 3- and 4-unit, flat-roofed structures, and approximately 75 were single- and two-family homes. When Winfield Township was first settled it had no school and its children were taken by bus to nearby districts whose limited facilities made them unwelcome.

The study states that nearby municipalities did not want to assume the cost of providing community or municipal services. The study concludes that Winfield Township, therefore, was "gerrymandered" by the Legislature into an independent township that had to develop its own government and municipal services.

TABLE II.—CURRENT EXPENSE PER PUPIL

Expenditures per pupil	Number of Districts	Number of pupils
Below $700	14	13,391
$700 to $800	54	83,917
$800 to $900	75	274,881
$900 to $1,100	248	631,975
$1,100 to $1,200	65	235,522
$1,200 to $1,500	106	215,948
Over $1,500	16	29,653

Other comparisons can be made. Industrial and commercial property distributions were studied by Dr. Neil Gold, director of the Suburban Action Institute. He testified that 112 municipalities with 11 percent of the State's population had commercial and industrial property almost equal in value to that possessed by a group of municipalities containing 39 percent of the State's population. The first group raised only $62 million in taxes compared with $262 million by the second group. The first group raised these taxes at a tax rate under 2 percent while the poorer groups taxed at rates of 6 percent or more. Yet most of the poorer communities must serve people of greater need because they have large numbers of dependent minorities; that is, blacks and those whose origin is Puerto Rican or Cuban. This may be illustrated by comparing nine municipalities that can be classified as "wealthy suburban" with five municipalities which may be termed "central city."

TABLE III.—COMMERCIAL REALTY COMPARISONS

School district	Commercial property	1970 population	Black and Spanish speaking pupils (1969) (percent)	Equalized school tax rate (1971)
Edison	$272,000,000	67,000	3.1	1.16
Paramus	259,000,000	28,000	.0	1.90
Union Township	177,000,000	53,000	11.3	1.32
Bridgewater-Raritan	162,000,000	30,000	.9	2.05
Berkley Heights	137,000,000	13,000	.1	2.04
North Brunswick	115,000,000	17,000	3.0	1.59
Mahwah	104,000,000	11,000	2.0	1.63
East Hanover	85,000,000	7,000	.2	1.73
Englewood Cliffs	65,000,000	6,000	.2	1.20
Total	1,376,000,000	232,000		
Newark	665,000,000	380,000	81.7	3.69
Jersey City	298,000,000	253,000	56.5	2.82
Paterson	189,000,000	143,000	63.1	2.57
Camden	130,000,000	101,000	70.8	2.57
Trenton	109,000,000	102,000	73.2	2.80
Total	1,391,000,000	979,000		

Wealthy suburbs are able to attract industry from central cities by preferential tax rates. The erosion of the central city tax base makes it more difficult for these cities to raise revenues for school and municipal purposes. This condition has developed largely in the last 20 years. During that period, in 39 major metropolitan areas of the country 85 percent of all industrial and commercial growth, measured by jobs, has taken place in the suburbs. In New Jersey, the rate has been 95 percent. The result is a declining tax base in older cities, in relatives terms. Although the statewide average of equalized valuations per pupil rose from $30,112 in 1960 to $41,026 in 1971, some central cities suffered a decline in valuations per pupil in absolute or relative terms, or both. These trends are shown in table IV below:

TABLE IV.—VALUATION TRENDS

	Enrollment	Equalized valuations per pupil		Enrollment	Equalized valuations per pupil
Camden:			Plainfield:		
1960-61	17,829	$17,777	1960-61	8,529	$26,771
1969-70	19,915	16,487	1969-70	9,116	30,943
Jersey City:			East Orange:		
1960-61	31,645	26,570	1960-61	8,797	37,533
1969-70	37,428	26,675	1969-70	10,148	32,152
Paterson:			State:		
1960-61	21,956	21,000	1960-61	1,055,085	30,112
1969-70	25,874	23,021	1969-70	1,448,686	38,172

Rising tax rates in cities compel compromises in funding services for education and other purposes. Nor is this trend likely to be reversed in the near future. What is more important and harmful is the separation of classes of people which has occurred in recent years. Social isolation aggravates the impact of economic differences in education. See *Booker* v. *Board of Education of Plainfield*, 45 N.J. 161, 170, 171 (1956).

There are, of course, many districts of low wealth other than central cities. But the plight of the older city, in which large numbers of black and other deprived minorities are isolated, presents an especially acute educational challenge. See Marburger, Carl A., "Considerations for Educational Planning," in A. Harry Passow, editor, "Education in Depressed Areas," Bureau of Publications, Teachers College of Columbia University (New York: 1963), at page 298. (Dr. Marburger is now the commissioner of education of New Jerey.) Of course, the State and Federal Governments have recognized the problem. Added school aid from both sources has been made available to these cities in recent years.[13] For a comprehensive survey of older city problems, see New Jersey Model Cities Report, supra.

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[13] Total federal aid for district programs as well as State administration was about $95 million in 1970–71, plus $12 million for areas affected by federal activity. The largest segment was in Title I funds (Elementary and Secondary Education Act of 1965, Title I, Public Law 89–10, as amended), $43 million in statewide total.

Examples of municipalities receiving substantial amounts of Title I funds are (in thousands):

Atlantic City	$1,165	Morristown	$101
Camden	2,660	Newark	9,046
Deptford	116	North Brunswick	581
East Orange	631	Orange	289
Elizabeth	891	Passaic	587
Englewood	196	Paterson	2,286
Franklin Township	173	Perth Amboy	406
Jersey City	2,787	Phillipsburg	114
Hoboken	710	Plainfield	452
Lakewood	302	Pleasantville	238
Long Branch	389	Salem	135
Millville	163	Trenton	1,706

The decision in this case, however, does not turn upon the special needs of older, large cities. The problems presented by the school funding system in New Jersey confront many poor suburban and rural districts as well.

Thirty-two school districts in New Jersey with an enrollment of less than 2,000 pupils each have equalized valuations per pupil under $20,000; 71 more school districts with less than 2,000 pupils each have between $20,000 and $30,000 in equalized valuations per pupil. Thus, 103 small school districts have valuations per pupil of less than $30,000 at a time when the State average valuation per pupil is over $41,000. Of these 103 small districts, 72 or approximately 70 percent, spend less than $900 per pupil for current expenses at a time when the State average is $1,009. Bear in mind that the State averages are brought down by the poorer districts. This may have reflected itself in the testimony of Dr. Edward Kilpatrick, assistant commissioner in charge of the division of administration and finance, State department of education, when he said that $1,200 per pupil would fund a fine educational program, looking at dollars alone.

Table II above, shows that only 21 percent of all school districts, with 17 percent of the statewide enrollment, have current expense budgets of $1,200 or more. On the other end of the scale are 143 districts, with 372,189 pupils, or 25 percent of statewide enrollment, with current expense budgets under $900. One district, Tabernacle Township in Burlington County, a K–8 district with 511 pupils, has a current expense budget of $561 per pupil. This is the lowest expenditure in the State. As will be shown later, the Bateman Act offers the least aid to poor rural and suburban districts which have a low AFDC population component.

III. Quality of Education

"Come, Tom," said Mother.
"Are you ready for school?
Are you ready, Betty?
Run to school, Tom.
Run fast, Betty."

—*Ousley* and *Russell*,
"On Cherry Street."
(A Ginn Basic Reader.)

The quality of elementary and secondary education in New Jersey probably runs from good to excellent in the vast majority of school districts. In some it is not simply poor, it is inadequate. Unfortunately, this case deals with the problems we have, not our successes.

The commissioner does not systematically test achievement levels of students although he is authorized by N.J.S.A. 18A:4–24 to do so in order to ascertain the "thoroughness and efficiency" of any public school. The commission apparently hears about certain problem schools from county superintendents who know where the trouble spots are. High school programs are approved by the department of education, and these schools are examined by State teams every 5 years. However, there is no published general evaluation of the condition of education in New Jersey. One may wonder why this is so when we are dealing with the most important function of our government, spending over $1.7-billion per year on our most valuable asset, the children of this State. An evaluation system can be readily devised. Each school could be required to administer tests and submit reports of some uniform type so that comparisons could be made. In any case, the closest we came in the testimony was by one witness, Joseph Clayton, a former assistant commissioner and, for a time, acting commissioner. He testified that about 20 percent of our school districts have schools that furnish inadequate education, though not necessarily all schools in the district. No estimate was given of the number of pupils involved. These schools are in poor rural areas, in old cities, and in poor suburbs as well.

If nationwide comparisons are of any help, 1970–71 figures show that New Jersey ranks high, third in the Nation, in current expenditure per pupil. Only New York and Alaska were higher. New Jersey ranked sixth in average salaries of secondary school teachers ($10,-250) and eighth in average salaries of elementary school teachers ($9,875). Research Division, National Education Association, "Rankings of the States, 1971," research report 1971–R1 at pages 21, 22, 62. These rankings are consistent with the wealth of New Jersey residents: third in personal income per child of school age ($17,087) and seventh in per capita personal income ($4,241) in 1969. Ibid, pages 30, 32.

But averages conceal disparities. The question is not how well we are doing on the average; the question is whether New Jersey's system of financing public schools creates impermissible disparities between rich and poor districts in educational opportunity, as well as tax burden. The attorney general disputes the conclusion that mere differences in dollar expenditures prove differences in the quality of education. He doubts the ability of the court to grapple with an issue as large and complex as the public school system; and there is some merit to both of these contentions. However, based on probabilities and expert opinion, in this as well as other kinds of cases, some conclusions can be drawn. As might be expected, there is a correlation between dollar expenditures and input (such as teachers and facilities), and between input and output (results).

The criteria proposed by the State board and the permanent commission (see n. 3) for classifying districts under the Bateman Act (to be discussed later) include input and output measurements. In budget appeals the commissioner himself decides on a case-by-case basis what funds are necessary for a "thorough" education and what are not. In doing so he looks at the proposed use for the funds and the specific needs claimed. He has also examined statistics in those categories which are included in schedule A as some general gage of the quality of education in the system. For example, in the 1969 budget appeal by the board of education of Englewood Cliffs, seeking to restore funds rejected by the voters and the governing body, the commissioner noted that Englewood Cliffs was among the highest in expenditures per pupil, salary schedules, facilities and equipment, and had one of the lowest pupil-staff ratios in the State. *New Jersey School Law* decisions (1969), at page 105. It is one of the few districts with closed-circuit television. The commissioner found that there were the products of high community aspirations and a very favorable tax base. The commissioner decided that Englewood Cliffs was spending enough, and he refused to restore any of the budget cuts.

How much is enough may be difficult for anyone to answer. However, it is less difficult to decide when input and output both are inadequate.

The principal ingredient in good education is good teachers. This, of course, is hard to measure statistically. One witness testified that high intellectual and verbal skills of a teacher are invariably associated with good teaching and good results. However, there are no available statistical comparisons of this quality in our teachers. Other measures have to be used for the purposes of this case. We have already noted that poorer districts have fewer teachers and less professional staff per pupil. A great enough difference may make the task of some teachers more difficult, allowing for less specialization and less preparation time for each subject. Some evidence was also submitted showing that wealthy districts have a higher percentage of teachers with advanced degrees. For example, the percentage of teachers with a master's degree in Millburn is 47 percent, in Princeton Regional, 41 percent, and in Englewood, 39 percent. In Jersey City it is 23 percent, Newark, 18 percent, and Camden, 13 percent. The pilot study, supra, at page 27, found that only one school district with equalized valuations of less than $30,000 per pupil in 1965, had a staff of which 30 percent or more had a master's degree. The evidence also shows that there is more teacher turnover in the poorer districts, with teachers leaving for more attractive school systems in wealthy suburban areas. These aspects allow some correlation between the quality of teaching and the wealth of the district, even though you don't need a master's degree to be a good teacher.

Other input factors include school buildings, equipment, textbooks and library facilities. There is ample evidence to show the correlation between wealth and the quality of these facilities, and that severe inadequacies exist in many poor districts.

In Paterson, 7 of 26 elementary schools in use were built between 1887 and 1899. Many buildings do not meet State standards for lighting and safety equipment. Only 2 or 3 schools have a library or librarian. Cafeteria and recreation areas are inadequate. Similar conditions can be found in other districts. In East Orange, where 54 percent of the population is black but 90 percent of pupil enrollment is black, 8 of 12 buildings were built before 1914, including one in 1873 and one in 1893. Instructional space equivalent to 76 classrooms is located in basement and attic areas, and 19 relocateable classrooms are in use. These substandard classrooms serve approximately 2,000 pupils. In Plainfield, the health room in one school has no sink or toilet.

In the city of Camden, 8 of 34 schools in use (over 20 percent) were built between 1874 and 1897. Some are three-story wooden frame structures. In some, lighting, ventilation and toilet facilities are inadequate. A study of the Camden school system by the State Department of Education was compiled in November, 1969. The report, here called the "Camden Survey," concludes at p. F–39 that almost all elementary schools in Camden are deficient in facilities for desirable programs such as art, music, science, home economics, etc. Also needed are suitable libraries and special services such as remedial reading, speech therapy and psychological assistance. Camden has 23 school buildings on sites of one acre or less. This precludes outdoor educational programs.

Again, deficiencies are not limited to schools in the older cities. Inadequacies due to lack of financing exist in other areas of the State. For example, Pine Hill is a K–6 school district in Camden County with 874 pupils in three schools. Pine Hill may fall somewhere between a rural area and a suburb. Pine Hill has equalized valuations per pupil of $13,354 and a school tax rate of $3.52. Even with State aid of over $300 per pupil, the present current expense budget is only $691 per pupil. Dr. Mark Hurwitz, executive director of the New Jersey School Boards Association (see N.J.S.A. 18A: 6–45), was superintendent of schools of Pine Hill from 1965 to 1967. He testified that Pine Hill's budget was voted down every year since 1954. When two submissions were required the electorate voted the budget down twice in the same year, even after it was pared down.

Dr. Hurwitz had to serve in two capacities, school superintendent and the principal of one school. There was no trained librarian in the system. In one school there was a closet with books that served as a library. Some science textbooks dated back to the 1940's, before astronauts had been heard of. There was no guidance counselor or speech therapist. A psychologist was available 1 day a month. Special program aids were virtually nonexistent. Pupils who were either gifted or below average could not get special instruction or materials, unless they qualified as handicapped, because Pine Hill could not afford options to meet special needs. Teacher recruitment was difficult. Five teachers operated on emergency certificates without a college degree. Two such teachers have taught in the system for more than 20 years. Not one teacher had an advanced degree.

Pupils from Pine Hill went into the lower Camden County regional district (7–12) which took pupils from seven elementary school districts. Those from Pine Hill had difficulty competing with other pupils, even with those from districts that were not much wealthier. A large percentage of Pine Hill pupils scored below national norms in tests for reading achievement and basic skills. Dr. Hurwitz concluded that the education in Pine Hill was inadequate due to insufficient funds.

Other evidence was offered to show inadequate education both on input and output terms. In Jersey City, tests showed that average results at the end of the first grade were at the national norm, but fell substantially below the national norm at the end of the seventh grade. A similar decline was shown by tests in Plainfield. This was interpreted as a failure of the system, since pupils able to learn at national norm levels do worse after being in the system for a number of years. There was evidence that a substantial number of pupils graduating from inadequate school systems are functional illiterates who cannot properly read and understand writing in normal use such as employment applications. A substantial portion of the students in the Camden City system cannot "read well, think well and work well," and some are illiterates, according to the "Camden Survey," pages II–5, and III–8, 9.

In Camden, in 1968–69, 287 of 945 teachers had substandard teaching certificates (86 in secondary schools and 201 in elementary schools). "Camden Survey," at P–4. There was only two Puerto Rican teachers in a system with 2,000 Puerto Rican students. Of 1,879 non-English-speaking children only 240 received instruction in English. In Paterson there are eight bilingual teachers for 4,000 Spanish-speaking children, a ratio of one to 500.

Naturally, the focus here is upon glaring, exceptional deficiencies. But indications are that they may occur more often than we would like to believe. It is difficult to imagine that in the 1960's a history book used in one lower school did not mention World War II, because, when the book was published, that war had not yet taken place. But that was the testimony of a former teacher. (How much can new books cost?) Also, in one school, classroom books could not be taken home because, old and torn, there were only one set of books, and several classes had to share them on the same day. So if this opinion does not discuss theories of education, the importance of early schooling, or tenure and lockstep salary ranges and their effects upon teacher performance, it is for obvious reasons.

Not all shortcomings are the fault of the school system. The learning of a pupil from a deprived environment is impeded by many factors. For example, many pupils come to school hungry, or have uncorrected sight or hearing defects which would interfere with learning. Some students have migrated from even more inadequate school systems. But there is ample evidence in the record that these limitations can be offset significantly by improved educational offering. Better physical examinations and followup is a simple example of how a school can overcome a learning handicap. Testimony in support of the more general conclusion was given by a number of witnesses, including Prof. James W. Guthrie of the University of California and Henry M. Levin, associate professor in economics and in education, Stanford University. See Guthrie, Kleindorfer, Levin & Stout, "Schools and Inequality," MIT Press (Cambridge: 1970), a study for the Urban Coalition, first published in 1969.

Prof. Henry S. Dyer of the educational testing service of Princeton, N.J., testified that pupil achievement is positively related to per pupil expenditure for instructional purposes. He estimated roughly that the relationship is on the order of 0.4 in correlation coefficient. This means that by his estimate per pupil expenditure is associated with about 16 percent of the variation in average pupil achievement. This is a positive but not a strong correlation. Others, including Guthrie and Levin, apparently see a higher degree of correlation. Professors Levin and Guthrie do not say that more money alone will make a difference. More money properly spent on proper programs can make a difference. Higher teacher salaries should enable a district to select teachers and supporting staff who are better fit for the needs of its pupils. More money can give districts options to attack their problems in ways not available to them now.

I am aware of the qualified doubts about the dollar-input-output relation raised by the Coleman Report. J. S. Coleman, et al., Equality of Educational Opportunity, U.S. Printing Office (Washington, D.C.: 1966). At p. 325, the Coleman Report concludes that family background and the social composition of the student body are the primary determinants of achievement in school.[14] The conclusions of the Cole-

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[14] *The Coleman Report*, at p. 325, concludes:

"That schools bring little influence to bear on a child's achievement that is independent of his background and general social context; and that * * * the inequalities imposed on children by their home, neighborhood, and peer environment man Report have been disputed, and the methods of analysis and measurement that underly the findings have been criticized. See Guthrie, et al., Schools and Inequality, *supra*, at pp. 92, 96–99. In fact, more recently Dr. Coleman has applauded the concept of equalizing educational offering by equalizing financing power and tax effort through methods proposed by Professor Coons and his associates. Coons, Clune, and Sugarman, Private Wealth and Public Education, *infra*, Foreward, pp. vii to xvi. The Coleman Report itself states that "improving the school of a minority pupil may increase his achievement more than would improving the school of a white child increase his. Similarly, the average minority pupil's achievement may suffer more in a school of low quality than might the average of white pupils." At p. 22. So far as this court is concerned, the only evidence offered in the case does show correlation between educational expenditures and pupil achievement over and above the influence of family and other environmental factors.[15]

Chapter 4 of Schools and Inequality, *supra*, reviews 17 studies which attempt to determine the effects of schooling exclusive of a pupil's social environment. The authors note the difficulty of isolating environmental and congenital characteristics which affect a student's performance. These influences have a strong impact on the student even before he enters school for the first time. Nevertheless, a number of studies conclude that school services are significantly related to pupil achievement. One of the early studies performed by the Educational Testing Service of Princeton[16] shows a direct correlation between pupil performance and school services such as:

1. The number of special staff (psychologists, reading specialists, counsellors) in the school;
2. Class size;
3. Pupil-teacher ratio; and
4. Instructional expenditures per pupil.

Other studies show a positive correlation between pupil performance and teacher characteristics (such as verbal ability, experience, salary level, academic preparation, etc.) and access to teachers (size of class, length of school year, etc.). The school environment, such as the age, size, and type of facilities available, also affects learning, but to a lesser degree.

Because the foregoing components can be translated into dollar costs, Professor Guthrie and his associates concluded that expenditures per pupil and teacher salary levels are significantly correlated with pupil achievement. Better education does make a difference regardless of the child's social environment.

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are carried along to become the inequalities with which they confront adult life at the end of school. For equality of educational opportunity through the schools must imply a strong effect of schools that is independent of the child's immediate social environment, and that strong independent effect is not present in American schools."

[15] It may well be that part of the Coleman Report must be given effect and that to equalize educational opportunity significantly de facto segregation of minority pupils must be overcome in addition to equalizing funds and facilities.

[16] Mollenkopf, William G., and Melville, S. Donald, "A Study of Secondary School Characteristics as Related to Test Scores," Research Bulletin 56–6 (Princeton: Educational Testing Service, 1956), mimeograph.

Dr. Dyer submitted charts (P–23 in evidence) which show a correlation between per pupil expenditures and various gages of performance, such as SAT scores and truancy rates. Figure VI of this exhibit shows the results of a controlled experiment in Hartford, Conn. ("Project Concern") in which 266 elementary school children selected at random were transferred from 5 depressed inner city schools to 35 elementary schools in affluent suburbs. A group of 305 similar students remained in the inner city schools to serve a a control group. Results were then tested by gain or loss in I.Q. scores. The experimental group transferred to the suburbs presented a median gain for pupils in 6 grades (1 thru 6) from the spring of 1967 to the spring of 1968 of 5.2 as compared with a median gain of 3.2 for the inner city group. Five of six grade groups transported to the suburbs made significantly greater gains in I.Q. than their counterparts in the city. (One group, grade 5, declined for unexplained reasons.) Grade 1 pupils in the suburbs gained 8.2 as compared with 3.0 for the city group.

Other testimony supported similar conclusions. Some studies show that students in depressed areas whose schools have achieved substantial improvement under Federal-aid programs have achieved better than similar pupils in the same city attending schools which have not been changed. This result has been reported for Washington, D.C., as well as Jersey City.

That dollars can make a significant difference in pupil performance is the premise of the Camden survey, supra, made by our State Department of Education. The Mancuso report, supra, at page 9, also concludes that while:

> . . . many communities are unable to adequately educate their youngsters, it is equally clear that many others are eminently successful. . . . Although there are some excellent small districts in the State, almost all evidence points to a correlation between enrollment, wealth, quality, education, and efficiency.

Limitations in this type of case, dealing with the system as a whole rather than problems of a given district, make it impossible to treat many aspects in the dollar-quality equation. To what extent can the consolidation of districts expand the range and quality of instructional opportunity without greatly changing costs? See Mancuso report, supra. To what extent are high dropout rates in central cities a reflection of unstimulating instruction, or other forces? Why do students from our deprived schools who want to go to college score appreciably lower in their SAT's than students from wealthy suburban schools? Should teachers get "combat pay" in some schools? Vocational training has not been explored in the case, but statistics in the NJEA Bulletin, page 31, suggest that county vocational schools have not reached enough pupils who could profit by this type of training. There was testimony on other points that I cannot dwell upon. One example is the self-fulfilling negative attitude of middle-class teachers toward students of low socioeconomic status. Also discussed was the low self-esteem of children from poor neighborhoods who begin their first contacts with American government by entering ancient, dilapidated buildings. Perhaps they ask themselves, "Is this what my State thinks of me?" (In school they are given a primer which shows a white house surrounded by neat, green lawns. It reads, "Are you ready for school, Tom? Run to school, Tom. Run fast.") In any case, even new schools won't take these children out of depressing neighborhoods. As was said recently about a black ghetto, the people who lived there "hated it so much that they had burned down a lot of it . . . . It was all they had, and they'd wrecked it." Kurt Vonnegut, Jr., Slaughterhouse-Five or the Children's Crusade, Delta Books (New York: 1969), at page 51.

Questions are asked because we do not have all the answers. Some conclusions, however, can be drawn on the specific issues of this case. Assistant Commissioner Edward Kilpatrick testified that his office had participated in the Camden survey, supra, and wrote the following at page H-2:

> With this dependence upon local property taxes for the support of such services in New Jersey, it is inevitable that the children in the poorest communities do not have the same educational opportunities as those in the more affluent districts.

The same report concluded that State aid under the foundation program is not sufficient to permit substantial improvement (p. III-3).

Clearly, a large number of New Jersey children are not getting an adequate education. This is caused in part by insufficient funds in many districts despite high taxes. On the other hand, many districts provide superior education with less tax effort. More money should make a significant difference in many poor districts. However, the problems in older cities with a large minority population are more complicated. It is too much to expect that our school system alone can solve all these problems. But much can be done, and doing more will cost more. Education is no exception to this fact of life.

IV. THE EDUCATION CLAUSE AND THE BATEMAN ACT

Between the idea
And the reality
Between the motion
And the act
Falls the Shadow

—*T. S. Eliot,*
"The Hollow Men."

A. THE BATEMAN ACT

The essential features of formula aid under the Bateman Act consist of "minimum support aid" and "incentive equalization aid." N.J.S.A. 18A:58-5. Both are determined on a weighted pupil basis, and both are designed to vary according to the classification of a district. The act provides for classification in five categories, from basic to comprehensive, depending on the quality and scope of the educational program offered, with higher levels of aid offered as an incentive to program improvement through higher expenditures. See Bateman report at pages 48, 49. Since the Bateman Act has not been fully funded, however, all districts are being treated as basic districts. The legislature has continued this uniform classification for 1972-73, L.

1971, c. 335, supra, and none can qualify for higher State aid based on higher classifications. Moreover, the classification criteria have not yet been adopted. Criteria formulated by the Commissioner with the approval of the State board have been rejected by the Permanent Commission on State Support. Other criteria have been proposed. When agreement is reached, the criteria are to be submitted to the legislature for enactment. N.J.S.A. 18A:58–3.

"Minimum support aid" and "school district guaranteed valuation" are both based upon the number of resident weighted pupils of the school district. N.J.S.A. 18A:58–2. Pupils are weighted to reflect varying costs of education according to grade levels. N.J.S.A. 18A:58–2; Bateman report at page 4. The principal categories of weights adopted by the legislature are:

	Units
Kindergarten pupils	0.75
Elementary pupils (grade 1 through grade 6)	1.0
Senior and 4-year high school pupils (equated to full time)	1.3

Additional weight is given for AFDC children (children in families residing in the school district who receive assistance under a program of aid to families with dependent children) between the ages of 5 to 17, inclusive, who reside in the district. Whether attending school or not, each such child counts as an additional 0.75 unit in determining the number of weighted children for the school district. N.J.S.A. 18A:58–2; Bateman report at page 48. Weighting increases aid to districts whose weighted enrollment is greater than actual enrollment. A 10-percent increase in pupils due to weighting will increase minimum aid and guaranteed valuations by 10 percent.

"State aid" under the Bateman Act is defined as minimum support aid, incentive equalization aid, transportation reimbursement, atypical (handicapped) pupil reimbursement, county aid, and vocational school aid. N.J.S.A. 18A:58–2.[17] All districts receive minimum support aid. This is $110 per pupil in a basic district. If the law is implemented by new legislation to establish classification criteria, minimum support aid will be increased in steps of $12.50 each for a limited district, an intermediate district, a precomprehensive district, and a comprehensive district, reaching the maximum of $160 per weighted pupil.

"Incentive equalization aid" is given to a district whose actual equalized valuation per pupil is less than the guaranteed valuation per weighted pupil based on the district's classification. In a basic district, total "guaranteed valuation" is a sum equal to $30,000 multiplied by the number of resident weighted pupils of the school district. The guaranteed valuations are to be increased in increments of $3,750 for each classification, reaching a maximum of $45,000 per weighted pupil in a comprehensive district.

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[17] The school building aid law was also amended by the *Bateman Act*. This aid, for debt service and capital outlay (as well as capital reserve fund), was amended to include the same weighting basis per pupil (including the AFDC factor), but not to exceed $45 per weighted pupil in resident enrollment, and subject to a local share equal to $0.075 per $100 of equalized valuations. This law is also subject to the 20 percent funding provision. *N.J.S.A.* 18A:58–18.1. Under the "emergency" building aid law of 1968 (L. 1968, c. 177, as amended by L. 1969, c. 136, L. 1970, c. 125 and L. 1971, c. 10) an additional sum not exceeding $25 per pupil is also available for debt service only for those districts found by the State Board of Education to be incapable of providing necessary school facilities (*N.J.S.A.* 18A:33–1) to satisfy the school laws. *N.J.S.A.* 18A:58–33.2 *et seq.* In 1972–73 building aid ($29.7 million) and emergency aid ($7.4 million) will approximate 27 percent of the annual debt service costs of local districts.

The formula for determining incentive equalization aid is set out in N.J.S.A. 18A:58–5. First, you compare the "guaranteed valuations" with the equalized valuations of the district. If the equalized valuations are more than the "guaranteed valuations," no incentive equalization aid is paid. If equalized valuations are less than the "guaranteed valuations," incentive equalization aid is paid in addiction to minimum support aid, calculated as follows: The "net operating budget" is first determined. This is defined as the current expense budget minus all estimated revenue, such as minimum support aid, transportation aid, Federal aid, if any, and so forth. The "net operating budget" is then divided by total guaranteed valuations. The result is the districts' school tax rate. That tax rate is then multiplied by the equalized valuations of the district to obtain the local tax requirement. The same tax rate is multiplied by the excess of guaranteed valuations over equalized valuations of the district to obtain the incentive equalization aid payable by the State.

Table V which which follows depicts various tax rates that would obtain in a school district depending upon the current budget and the equalized valuations of the district. For purposes of illustration, I have assumed districts with equalized valuations of $20,000, $30,000, $45,000, and $60,000 per pupil, and I have assumed that a district chooses to spend $1,000, $1,200, or $1,400 per pupil. The weighting factor of 1.10 was assumed as a general average for all non-AFDC districts. See statewide pupil distribution data in the Commissioner's Nineteenth Annual Report (1969–70), at p. IX. Also, to determine the net operating budget, a deduction of $50 per pupil was assumed arbitrarily to represent other district revenue, such as transportation aid and Federal aid, other than formula aid. Tax rates were computed for each district as a basic district as well as a comprehensive (comp.) district.

TABLE V.—TAX RATES UNDER THE BATEMAN ACT—DISTRICT EQUALIZED VALUATION

	$1,000 tax rate		$1,200 tax rate		$1,400 tax rate	
	Basic	Comparable	Basic	Comparable	Basic	Comparable
Annual per pupil expenditure:						
$20,000	2.51	1.56	3.12	1.97	3.72	2.37
$30,000	2.51	1.56	3.12	1.97	3.72	2.37
$45,000	1.84	1.56	2.29	1.97	2.73	2.37
$60,000	1.38	1.29	1.71	1.62	2.05	1.96
Adjusted for 1.434 weighting, including AFDC, per pupil:[1]						
$20,000	1.84	1.12	2.31	1.43	2.77	1.74
$30,000	1.84	1.12	2.31	1.43	2.77	1.74

[1] The weighting factor of 1.434 was derived by averaging current Jersey City and Camden enrollments and AFDC population figures. Camden's enrollment of 20,436 is increased by units for AFDC children (which adds 10,588 units), and units for grade levels, to a total weighted enrollment of 32,572. Jersey City's enrollment is approximately 39,000· its AFDC factor adds 10,642 units; the total weighted enrollment is 52,328. The average weighted enrollment in Jersey City and Camden combined is 1.434 units per resident pupil.

Using a basic district as an example, with equalized valuations of $20,000 per pupil, calculations under the formula can be simplified as follows:

Select the current total expense per pupil ($1,200); subtract the $121 (minimum aid per pupil of $110, raised 10 percent due to a 1.10 weighting factor) and also subtract $50 (representing other revenue, such as transportation aid). This leaves $1,029 to be raised by local taxes and State equalization aid. Divide $1,029 by $33,000 (the guaranteed valuation of $30,000 raised by 10 percent due to a 1.10 weighting factor) to get a tax rate of 3.12 percent. Thus, the amount to be raised by local taxes is 3.12 percent of $20,000 or $624. State equalization aid is $1,200 minus $121 (minimum support aid), minus $50 (other revenue), minus $624 (local revenue), or $405 per pupil. This is equal to 3.12 percent of the difference between equalized valuations per pupil ($20,000) and guaranteed valuations per weighted pupil ($33,000). Thus, this assumed basic district, spending $1,200 per pupil, will raise $624 locally at a tax rate of $3.12 per $100, and will receive $121 in minimum support aid, plus $405 in State equalization aid, plus $50 in other revenue. Under the foundation plan this district would have received $215, *i.e.*, $100 minimum aid plus $115 in equalizing aid, (plus $27 if one of the 6 largest cities) per pupil. First year Bateman aid would be $215 plus 20 percent of $311, or $215 plus $62.20. $311 represents the difference between Bateman aid fully funded ($526) and the foundation plan formula aid of $215, based on my assumed model.

Under the Bateman formula fully funded, excluding an AFDC weighting factor but assuming an average weighting factor of $1.10, basic districts are in effect guaranteed equalized valuations per pupil, of $33,000. Districts with $33,000 or less in equalized valuations per pupil will have the same tax rate. Every basic district with more than $33,000 in equalized valuations per pupil, and with the same budget, will have a lower tax rate. Thus, the Bateman Act continues to employ a wealth-based formula. It differs from the foundation plan in that Bateman includes a weighting factor and allows relatively poor districts to receive, in addition to minimum support aid, a higher share from the State in proportion to the total expenditures of the district. Under the foundation plan, the State participated only to the extent of a given level of expenditures; namely, $425 per pupil (plus $27 for the six largest cities).

Districts with a high proportion of AFDC children will receive more minimum aid and a higher effective guaranteed valuation per pupil. Table V above shows the results of a weighting factor of 1.434 units in an assumed high AFDC district. The figures were computed as indicated in n. 17 above, by using the average of current Camden and Jersey City enrollments and AFDC populations. The effect of this weighting factor is to increase minimum aid by 43.4 percent to $157.74 and to increase the guaranteed valuations per pupil by 43.4 percent from $30,000 in a basic district to $43,020. Thus, a basic district with a high AFDC population spending $1,200 per pupil will have a tax rate of 2.31 percent, approximately equal to the tax rate of a basic non-AFDC district with equalized valuations per pupil of $45,000.

The AFDC weighting factor would have an appreciable effect under Bateman fully funded. N.J. Model Cities Report, *supra*, at p. 19, states that the total number of AFDC children in the State increased from 25,000 in 1965 to 72,000 in 1969–70. The Department of Education reports that the total number of AFDC children in the State is now 198,000. However, receiving increased formula aid or Federal aid because of AFDC children should not be viewed as a windfall. It should cost much more to provide an adequate education in districts, such as Jersey City and Camden, where AFDC children between the ages of 5 and 17 are equal in number to roughly 30 percent to 60 percent of the total school enrollment. See n. 17 above. This increased cost was appreciated by the Bateman Committee. The Bateman reports states (p. 48):

> It is now recognized that children from lower socioeconomic level homes require more educational attention if they are to progress normally through school. When the additional compensatory education is provided, it results in *substantially higher costs. The weighting* of the children from the lower income families *compensates in part* for the larger expenditure necessary to provide them with an adequate educational program so they may overcome their lack of educational background. (Emphasis added.)

Another desirable feature of the Bateman Act was the provision to allow an adjustment in minimum support aid and incentive equalization aid according to changes in the cost of education from year to year and changes in the statewide average of equalized valuations. N.J.S.A. 18A:58–6.3. Unfortunately, funding increments of "20 percent" per year will delay full implementation of the act and may not include money to allow adjustments for inflation. If Bateman had been fully funded in the first year with all districts classified as basic, the total formula aid required would have been approximately $365 million, an increase of approximately $150 million over 1970–71. The legislature actually increased formula aid by approximately $28 million in the first year. But part of this increase was needed simply for additional pupils coming into the system, and part was also used for the save harmless clause contained in N.J.S.A. 18A:58–18.1.[18] If all districts were classified as comprehensive districts, the estimated annual cost under the Bateman Act would be $650 million, based on September 30, 1970, weighted enrollments. This is an increase over the foundation program of approximately $430 million.

There is no prefunding under the Bateman Act which would make it easier for a poor district to qualify as a comprehensive district. Many wealthy districts in the State would readily qualify as comprehensive districts under criteria suggested by the Bateman committee (Bateman report, at pp. 61–63) or that presently being considered. However, the Bateman committee recognized that some districts "might not be able to attain a higher classification for reasons beyond their control." Bateman report, at page 41. The Bateman committee proposed that the Commissioner should have the authority to change the classification of the district if "in his judgment, the geography, sparsity of population, inadequacy of property valuations, difficulty of transportation, or other factors make it impossible to qualify for a higher level of State aid" Id. This recommendation, however, was not adopted by the legislature. The statute simply provides that criteria to be adopted for classifying districts shall take into consideration "the quality of the educational program of the districts." N.J.S.A. 18A: 58–3. Thus, there is little likelihood of poor districts receiving State equalization aid as comprehensive districts. The present funding does not remotely approach the moneys needed, and poor districts cannot do it on their own. "Camden Survey," supra, at page II–1.

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[18] The save harmless clause guarantees that "no school district shall be apportioned for minimum support aid, incentive equalization aid and county vocational school aid an amount less than the per pupil aid, excluding transportation aid and atypical aid, it received for the State fiscal year 1970–71."

B. THE EDUCATION CLAUSE

Article VIII, section IV, paragraph 1, of the 1947 constitution states:

> The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of 5 and 18 years.

This clause was first adopted in 1875 as an amendment to the 1844 Constitution. The history of education in New Jersey tells us that this provision was adopted in order to secure as a constitutional right the results of the first 100-year struggle in New Jersey for free and thorough education for all. See Roscoe L. West, "Elementary Education in New Jersey: A History," D. Van Nostrand Co., Inc. (Princeton: 1964) at pages 42–45: Robert D. Bole, "A History of State School Support in New Jersey," The Bateman Report, *supra*, at page 11.

In his abbreviated history contained in the Bateman report, (p. 12) Professor Bole says that the 1851 statue, which gave school districts unlimited taxing power, "set in motion a trend which New Jersey retains to the present day: i.e., school financial support in New Jersey became predominantly a local responsibility." However, this history fails to mention the proportion of State aid in the critical period from 1871 to 1881, during which time the education clause was adopted.

In 1871 the legislature enacted the free school law. L. 1871, c. 527. By this law, tuition fees which had been charged by some "public" schools in the State were abolished. The 1871 law levied a uniform tax on all real property in the State at 2 mills per dollar valuation ($0.20 per $100). If this money was not enough to maintain free schools in operation for at least 9 months each year, then local districts were required to raise the needed sum by a township tax. State school tax moneys were distributed among school districts according to the number of pupils in each district. The law further provided that, except for $20 per year, State money paid to each school district must be used solely for teachers' salaries and fuel (sec. 10).

In discussing the 1871 law, State Superintendent Apgar said in his annual report of 1871 (at p. 12):

> The principal support will come from the State, and if any sum is needed to be voted by the township, it will be small . . .

The 1871 school law raised significantly the proportion of school costs borne by the State. In 1870, for example, township and district school taxes ($1.45 million) and tuition ($72,000) constituted 90 percent of the total Statewise expenditures ($1.66 million) and the State appropriation was only $100,000. Annual school report, 1870, at p. 11. Thereafter, from 1872 through 1880, State funding averaged 75 percent of all school costs, exclusive of construction and repairs. Local revenues constituted 23 percent of current expenses and 40 percent of all expenditures inclusive of construction and repair of schools. In fact, during these years many townships and districts raised no school taxes at all. In 1872, for example, 188 of 230 townships and 887 of 1,378 districts raised no school tax. N.J. school report, 1872, at page 8.

The State continued for many years to pay a large portion of all school costs, although in 1881 it enacted a law ordering 90 percent of State school taxes returned to the county of origin, leaving only 10 percent to be distributed by the State board equitably. L. 1881, c. 106. However, even under the 1881 law, moneys returned to the counties were apportioned to all school districts in accordance with pupil census, so that equalization was achieved at least among pupils of each county. As late as 1910, for example, the State share of current expenses was approximately 67 percent and was almost equal to the total cost of teachers' salaries. N.J. school report, 1910, at pages xv, xvi. This is not to suggest that the education clause adopted by the 1875 amendment requires funding of education costs out of general State revenues. This was the ideal sought by the friends of education, as the history demonstrates. Certainly the reenactment of the education clause as part of the 1947 constitution was not made with the consensus that public education had to be fully funded by the State out of general revenues. A proposal to include such language in the education clause was not adopted. "Recommendations of the New Jersey State Federation of Labor," versus Proceedings of the Constitutional Convention of 1947, State of New Jersey, appendix, at page 893.

The education clause was intended to do what it says, that is, to make it a State legislative obligation to provide a thorough education for all pupils wherever located. *Landis* v. *School District No. 44, Camden County*, 57 N.J.L. 509 (Sup. Ct. 1895); *Society for Establishing Useful Manufacturers* v. *Paterson*, 89 N.J.L. 208 (E. & A. 1916), reversing 88 N.J.L. 123 (Sup. Ct. 1915). This does not preclude local administration and responsibility. *Riccio* v. *Hoboken*, 69 N.J.L. 649 (E. & A. 1903), reversing 69 N.J.L. 104 (Sup. Ct. 1903), held that school districts may be established for the management and support of schools. See also *West Morris Regional Board of Education* v. *Sills*, 58 N.J. 464, 477 (1971). However, the *Riccio* case held that certain classifications in the school law of 1902 were unconstitutional because they treated some school districts differently according to unimportant characteristics not germane to the purposes of the law. 69 N.J.L. at page 661.

Although districts can be created and classified for appropriate legislative purposes, it was held in the *Society for Useful Manufacturers* case, *supra*, that the State school tax remained a State tax even though assessed and levied locally upon local property, with revenues returned by the State to local districts. The court held that prior to the 1875 amendment public schools were a matter of local rather than State concern, but that the amendment made the support of public schools a State concern. 89 N.J.L. at page 211.

In *Landis* v. *School District No. 44, Camden County*, *supra*, the court dealt with the constitutionality of that provision of the State school law which permits local districts to raise sums in addition to the State levy. The court held that the Constitution does not require "the same means of instruction for every child in the State." 57 N.J.L. at page 512. The 1875 amendment was said "to impose on the legislature a duty of providing for a thorough and efficient system of free schools, capable of affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship; and such provision our school laws would make, if properly executed, with the view of securing the common rights of all before tendering peculiar advantages to any." The court further held that the legislature also had power to provide "beyond this constitutional obligation . . . in its discretion, for the further instruction of youth in such branches of learning as, though not essential, are yet conducive to the public service. On this power, I think, rest the laws under which special opportunities for education at public expense are enjoyed."

The word "thorough" in the education clause connotes in common meaning the concept of completeness and attention to detail. It means more than simply adequate or minimal. Not adopted was a lower standard of education which had been proposed:

> Public schools shall be established and maintained for the gratuitous instruction of all persons in the State between the ages of 5 and 18 years, such schools to give rudimentary instruction, and not to fit or prepare scholars for college, or to be controlled by or under the influence of any creed, religious society or denomination whatever. New York Times, November 24, 1873, page 2:4.

It is clear from findings made earlier that a "thorough" education is not being afforded to all pupils in New Jersey. However, the Bateman Act would probably afford sufficient financing for a thorough education if that act were fully funded. In an area as difficult and costly as education, the judiciary would not invalidate a statute simply because all the funds necessary to fulfill its objectives were not made available in the first year or two of operation. As the Supreme Court said in the *West Morris Regional Board* case *supra*, 58 N.J. at page 481, where public moneys are involved, "modest objectives must be allowed even though more pervasive ones would be welcome." A statute may not be invalidated "merely because it would also be reasonable to do more." This is not to say that a statute will be left intact without a reasonable expectation that the fundamental constitutional demand for a thorough education will be achieved in the near future. A court would consider at least taking such steps as are necessary to allocate available resources in order to more closely approximate the constitutional demand. As a first step, certainly, the provision affording minimum support aid to each district regardless of wealth and the save-harmless provision of the Bateman Act should yield to the State constitutional purpose.

The Bateman Committee sought to justify minimum aid on the ground that it would provide even wealthy districts with the incentive to improve educational programs, and to maintain them at high levels. Bateman Report at pages 48–49. The justification offered at trial was that the State "should do something for every district." However, as long as some districts are receiving inadequate education, below that constitutionally required, the reasons offered cannot constitute a valid legislative purpose. As long as some districts are underfinanced, I can see no legitimate legislative purpose in giving rich districts "State aid." I am satisfied by the evidence that a strong reason for minimum aid and save-harmless aid is political; that is, a "give up" to pass the leglisation.

I conclude, therefore, that the Bateman Act as presently funded does not meet the State constitutional standard of a thorough education for all. Fully funded, however, with funds to offset inflationary trends, the Bateman Act would probably reach this goal, even in cities with a high AFDC composition. It might also reach the constitutional goal in poorer non-AFDC districts, although they will remain at a disadvantage in competing with wealthy suburbs and AFDC cities in dollars available for good teachers. Accordingly, the Bateman Act will not be invalidated on the ground that at present funding levels it does not provide a thorough education for all. However, the minimum support aid and save-harmless provisions cannot be reconciled at this time with the command of the education clause.

V. EQUAL PROTECTION OF THE LAWS

> . . . all men are created equal . . .
> —Declaration of Independence, 1776.

> Each child in the State has the right to an educational program geared to the highest level he is capable of achieving, permitting him to realize this highest potential as a productive member of society.
> —The Bateman Report, at page 38.

Article I, paragraph 1 of the New Jersey Constitution of 1947 provides as follows:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

Our Supreme Court has held that this clause contains an implied guarantee of equality comparable to the equal protection clause of the 14th amendment. *Washington National Ins. Co.* v. *Board of Review, N.J. Unemployment Compensation Commission*, 1 N.J. 545, 554 (1949); see *Bailey* v. *Engelman*, 56 N.J. 54, 55 (1970). Where educational objectives are left primarily to the States, it may be preferable for New Jersey to develop its own rules of equality though they may be more stringent than Federal standards. See *Booker* v. *Board of Education of Plainfield*, 45 N.J. 161 (1965), dealing with a mandate of the State Commissioner of Education to alleviate de facto segregation in public schools; see also *Jenkins* v. *Township of Morris School District*, 58 N.J. 483 (1971).

Inequalities and inadequacies exist under our financing system. Inequalities are inherent in a system where the capacity to raise taxes for school purposes differs according to the wealth of districts.

It is argued that the system is justified by the State's desire to afford local control over education. To what extent local control is real or mythical has been debated in this case. The Bateman Act provides that the Commissioner "shall review each item of appropriation within the budget" of a district whose local tax requirement is less than State formula aid. N.J.S.A. 185A:58–5. There is evidence to indicate that as much as 90 percent of some current budgets are composed of costs that are more or less fixed or recurring. These include teachers' salaries (which are the largest portion of the budget), pension costs, insurance and debt service costs. See N.J.S.A. 18A:29–4.1 which requires implementation of teacher salary policies and schedules. Most authorities agree that local control, in the sense of hiring teachers, establishing programs, and allocating available resources, is desirable. Beyond common essentials, educational goals should be adjusted to community needs. Also, raising local revenues for school costs may tend toward more efficient use of funds. However, while these purposes may be pursued by appropriate means, local control and responsibility cannot be used to justify a system that breeds substantial disparities in the quality of education. The shortage of funds in some districts actually minimizes local discretion in programing and in the ability to compete for the services of good teachers. School boards in poor districts cannot opt to institute special services when their budgets do not include adequate funds even for essentials. In this sense local control is illusory. It is control for the wealthy, not for the poor.

In theory, the Bateman Act goes far toward equalizing the revenue-raising power of local districts. Even for those districts with a large number of AFDC children, however, the Bateman Act equalizes only to a given level. Poor, non-AFDC basic districts in rural areas and suburbs will not be raised even to the State average of equalized valuations. One reason for this is that the $30,000 guaranteed valuation level chosen by the Bateman committee was based upon the 1965–66 per pupil State median valuation, which was then $32,057. Bateman report, at page 50. The Bateman Act was not adopted until 1970. It became effective July 1971. By this time the statewide average equalized valuation was more than $41,000 per pupil. See appendix A. Table I, above shows that there are 208 districts in the State with a total enrollment of 620,000 (approximately 40 percent of total State enrollment) whose valuations are less than $35,000 per pupil. Excluding the AFDC weighting factor, the remaining districts in the State, with an enrollment of 865,000, can raise school funds as basic districts at lower tax rates than the first group, even after the equalization formula is given effect. Although the AFDC factor will tend to assist those districts with high AFDC populations, the added costs in educating pupils of those districts should offset the gain in State aid. Moreover, there is no assurance that local officials, particularly in type I districts will use the added aid for improved education by increasing budgets appreciably; they may simply use the aid to help keep tax rates down. Camden, for example, receives State aid of $345 per pupil, plus substantial Federal aid (n. 13, supra) and still has a current expense budget of only $843 per pupil. The Bateman Act itself reduces incentive equalization aid in proportion to the amount of Federal aid received by a district. See definition of "net operating budget." N.J.S.A. 18A:58–2.

The large group of pupils in small, poor districts, in rural areas and elsewhere, with little AFDC population, are likely to derive the least benefit from the Bateman formula, as table V shows. These "poor" districts with valuations of $30,000 or less per pupil must tax at 3.12 percent in order to spend $1,200 per pupil as a basic district, under Bateman fully funded. Spending $1,200 per pupil, a basic district with equalized valuation per pupil of $30,000 must raise $936 by local taxes in order to receive $121 in minimum aid (weighted) and $93 in State equalization aid. By comparison, districts with $60,000 in equalized valuations, spending the same amount, have a tax rate of 1.71 percent and will still receive $121 in minimum support aid.

Even if districts were better equalized by guaranteed valuations, the guarantees do not take into consideration "municipal and county overload." This was a problem which the Bateman committee recommended to the permanent commission for further study. Bateman report, page 9. Poor districts have other competing needs for local revenue. the evidence shows that poorer districts spend a smaller proportion of their total revenues for school purposes. The demand for municipal services tends to diminish further the school revenue-raising power of poor districts. Another general disadvantage of poor districts is the fact that property taxes are regressive; they impose burdens in inverse proportion to ability to pay. This is because poor people spend a larger proportion of their income for housing. See "New Jersey Model Cities Report" at pages 38–40; "Guthrie et al., Schools and Inequality" supra at pages 186–188.

This is not to suggest that the same amount of money must be spent on each pupil in the State. The differing needs of pupils would suggest the contrary. In fact, the evidence indicates that pupils of low socioeconomic status need compensatory education to offset the natural disadvantages of their environment. This is consistent with some comments in the *West Morris Regional Board* case, supra, 58 N.J. at 477, 478. While that opinion states in dictum that the equal protection clause of the 14th amendment does not require identical expenditures for all students, and states that benefits "may indeed depend upon the district of a student's residence" (at p. 478), the court clearly stated that it did not "anticipate the question whether the State statutory scheme may, because of local failures, become unequal to the constitutional promise and command." Ibid, n. 7.

Providing free education for all is a State function. It must be accorded to all on equal terms. *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954). Public education cannot be financed by a method that makes a pupil's education depend upon the wealth of his family and neighbors as distinguished from the wealth of all taxpayers of the same class throughout the State. *Serrano* case, supra; *Van Dusartz* case, supra: *Rodriguez* case, supra, n. 1.

Arthur Wise, associate dean, the Graduate School of Education, University of Chicago, first advanced this thesis in "Is Denial of Equal Educational Opportunity Constitutional?" XIII. Administrator's Notebook, No. 6 (University of Chicago, February 1965). He elaborated upon it in "Rich Schools, Poor Schools," University of Chicago Press (Chicago: 1968). It was his contention that the present system of funding education of all States except Hawaii (which is funded entirely out of general State revenues), denies the equal protection of the laws. A similar thesis has been advanced by Coons, Clune, and Sugarman, in "Educational Opportunity: A Workable Constitutional Test for State Financial Structures," 57 Cal. L. Rev. 305 (1969), and in "Private Wealth and Public Education," the Belknap Press of

Harvard University Press (Cambridge: 1970). It is this thesis that has been adopted by the Supreme Court of California in *Serrano*, supra, and by the Federal courts in *Van Dusartz*, supra, and *Rodriguez*, supra.

The New Jersey system of financing public education denies equal protection rights guaranteed by the New Jersey and Federal Constitutions. In support of this conclusion, I adopt the thesis of the foregoing authorities. Education is one of the most important functions of State governments, and educational opportunities, where the State has undertaken to provide them, is a right that must be made available to all on equal terms (*Brown* v. *Board of Education*, supra). Education is a fundamental interest, vital to the future of every citizen (see *Brown*, supra; *Booker*, supra, where our Supreme Court said, "It is during their formative school years that firm foundations may be laid for good citiezenship and broad participation in the mainstream of affairs," 45 N.J. at 170–171). Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored. *Harper* v. *Virginia Bd. of Election*, 383 U.S. 663, 668 (1966); *Griffin* v. *Illinois*, 351 U.S. 12 (1956). Thus, where fundamental rights are asserted under the equal protection clause, classification will be closely scrutinized. *Reynolds* v. *Sims*, 377 U.S. 533, 561–562 (1964); *Harper*, case, supra, at page 670.[19]

No compelling State interest justifies the State's present financing system. It is doubtful that this system even meets the less stringent "rational basis" test normally applied to the regulation of State fiscal or economic matters. See *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483 (1955). While local control is desirable, discriminations should not be tolerated if they are not necessary for achieving the stated purpose. See *Riccio* case, supra. A finance system can be devised for New Jersey which affords equal protection to all pupils without precluding local control over public education. The invidious disparities cannot be justified by any overriding State purpose. Distribution of school resources according to the chance location of pupils cannot be tolerated under the State or Federal Constitutions.

The Attorney General contends that two earlier Federal cases foreclose consideration of the Fourteenth Amendment equal protection claim. *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968); aff'd mem. *sub nom McInnis* v. *Oglivie*, 394 U.S. 322 (1969); *Burruss* v. *Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), aff'd mem. 397 U.S. 44 (1970). This contention was rejected by the courts in *Serrano*, *Van Dusartz* and *Rodriguez*, supra, on the grounds that *McInnis* and *Burruss* were limited to the assertion of a "needs" test for the distribution of school funds. (The "needs" test was rejected by our own Supreme Court in relation to the distribution of AFDC funds. *Bailey* v. *Engleman*, supra, n. 5.) The Complaint in *McInnis* (see Coons, et al., Private Wealth and Public Education, supra, at p. 306) and in *Burruss*, appear broad enough to include the claims made here and in *Serrano*. Nevertheless, the conclusion that the issue is still open despite the summary affirmances in *McInnis* and *Burruss* is confirmed by the more recent action of the United States Supreme Court in *Askew* v. *Hargrave*, 401 U.S. 476 (1971).

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[19] See also in general, Note, "Development in the Law—Equal Protection". 82 *Harv. L. Rev.* 1065 (1969), and Michaelman, "On Protecting the Poor Through the Fourteenth Amendment," 83 *Harv. L. Rev.* 7 (1969).

The equal protection concepts applied here derive from cases that seem to lend themselves more readily to judicial control. See *Reynolds* v. *Sims*, *supra*, asserting the standard of one-man, one vote; *Griffin* v. *Illinois*, *supra*, holding that an indigent defendant is entitled to a free transcript on appeal; the *Harper* case, *supra*, holding that a $1.50 poll tax is an unconstitutional restraint of the right to vote. But one facet of the case at hand does invite a simple standard. Since the State constitution requires the State legislature to provide a thorough education for all pupils age 5 to 18, a tax levied to raise revenues for that specific State purpose should be applied uniformly to all members of the same class of taxpayers. Under the present system taxpayers in different districts pay different tax rates for school purposes. To the extent that these revenues fulfill the State's constitutional obligation to provide a "thorough" education, the purpose remains a common State purpose, not a local purpose. (It is noted that there is no comparable provision in our constitution dealing with municipal services such as police, fire, sanitation, etc.). Accordingly, the "equality" provisions of the State and Federal Constitutions preclude taxing the same class of property at different rates. See *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 625 (1945); *Baldwin Construction Co.* v. *Essex County Board of Taxation*, 16 N.J. 329 (1954); *In re Appeals of Kents* case, *supra*, 34 N.J. at pp. 28, 29; *City of Passaic* v. *Passaic County Board of Taxation*, 18 N.J. 371, 381 (1955).

Uniformity in taxation is required by N.J. Const., Art. VIII, sec. I, par. 1(a), which is as follows:

> Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State of allotment and payment to taxing districts shall be assessed according to the same standard of value, except as otherwise permitted herein, and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.

No opinion is expressed here on the relationship of the second sentence of paragrah (a), above, to a statewide tax on real property at a uniform rate for distribution to school districts. This was not an issue in the case. It is clear that some kind of uniform, statewide tax can be adopted by the State to finance "thorough" education without relying on a real property tax. In 1935 the legislature adopted a sales tax to support school finance reform, but it was repealed within 4 months. See Bateman Report at p. 18.

One hundred years ago, after a long struggle, the State adopted the 1871 free school law and made the right to a thorough public education a constitutional right. The proposition that the education of a child should be substantially supported by all the citizens of the State prevailed for a time over dissenting voices. The arguments in opposition were answered by State Superintendent Ellis Apgar. He reasoned that the "general diffusion of intelligence is for the general good" of the State and that equity demands that the expense be paid "by a uniform rate of taxation" on the people as a whole. To those who argued that schools should be supported by a county tax only he replied: the county is simply a subdivision of part of the whole political organization which is the State, and to support schools with county taxes would discriminate in favor of wealthy counties over those that are poor. He noted that some people favored a township tax to support only the schools of their own township and that, even if this were adopted, it would fail to please wealthy taxpayers from whom the objections come. He concluded by saying that if the question "of giving and receiving" is discussed further between two neighbors, one "blessed with children only, and the other with property only" the logic of the argument would compel but one conclusion: "Our public school system must be abolished and every man must educate his own children." New Jersey School Report, 1878, at pp. 23, 24.

There is no compelling justification for making a taxpayer in one district pay a tax at a higher rate than a taxpayer in another district, so long as the revenue serves the common State educational purpose.[20] Moreover, education is too important to the State as well as the children of the State to be largely controlled by the haphazard distribution of real property wealth. The State and its courts have a special solicitude for the welfare of children since they have little control over their own destinies. Children may become wards of the court simply to insure that they be provided with "proper protection, maintenance, and education." N.J.S.A. 9:2–9; N.J.S. 2A:4–2; see *State* v. *Perricone*, 37 *N.J.* 463, 476 (1962). Education is not left to the discretion of a parent. By statute every parent is compelled to have his child between ages 6 and 16 attend schools. The public school that he attends is entirely the creation of State laws. As was said in *Van Dusartz*, *supra*, "What is important to note is that the objection to classification by wealth is in this case aggravated by the fact that the variations in wealth are State created. This is not the simple instance in which a poor man is injured by his lack of funds. Here the poverty is that of a governmental unit that the State itself has defined and commissioned."

Education serves too important a function to leave it also to the mood—in some cases the low aspirations—of the taxpayers of a given district, even those whose children attend schools in the district. The uncertainty of raising sufficient local funds for school purposes is the very hazard that the uniform State tax was designed to meet under the free school law of 1871. As State Superintendent Apgar stated then, "By this change our school system is, for the first time in its history, placed upon a sure and substantial basis. Our schools will no longer depend for their support upon a fund which a mere majority at a town meeting may any year withhold." The education clause and the equality provisions of the New Jersey constitution require a more certain and uniform basis than our statutory scheme now provides for the thorough education of each child.

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[20] If monies are supplied to local districts from general State revenues sufficient for a "thorough" education, some districts may still decide to add to that sum by local property taxes. This may reintroduce inequities of various sorts; however, the issue was not argued, and my decision is not intended to reflect upon it. See *Landis* case, *supra*.

For the foregoing reasons I hold that the statutes of New Jersey do not provide the equality of educational opportunity which is demanded by our State constitution. In my opinion the statutory scheme also violates the equal protection clause of the 14th amendment.

VI. CONCLUSION

The present system of financing public elementary and secondary schools in New Jersey violates the requirements for equality contained in the State and Federal constitutions. The system discriminates against pupils in districts with low real property wealth, and it discriminates against taxpayers by imposing unequal burdens for a common State purpose. The State must finance a "thorough and efficient" system of education out-of-State revenues raised by levies imposed uniformly on taxpayers of the same class. The present equalizing factors in the law are not sufficient to overcome inequities in the distribution of school funds and tax burdens.

The present financing system is declared unconstitutional; but this declaration shall operate prospectively only and shall not prevent the continued operation of the school system and existing tax laws and all actions taken thereunder. This declaration shall not invalidate past or future obligations (such as school bonds, anticipation notes, etc.) incurred under the provisions of existing school laws and tax laws. Said laws shall continue in effect unless and until specific operations under them are enjoined by the court. See *Switz* v. *Middletown, supra*, 23 N.J. at pages 598–599; *Village of Ridgefield Park* v. *Bergen County Board of Taxation*, 33 N.J. 262, 266 (1960). To allow time for legislative action, such operations shall not be enjoined prior to January 1, 1974, except that if a nondiscriminatory system of taxation is not enacted by January 1, 1973, then from and after that date no State moneys shall be distributed to any school districts pursuant to the "minimum support aid" provisions and the save harmless provisions of the Bateman Act (L. 1970, c. 234) which have been identified previously in this opinion. All funds that are thereby set free shall be distributed by appropriate State officials in a manner that will effectuate as far as possible the principles expressed herein; more specifically, these funds shall be applied to raise guaranteed valuations to the highest level that a proportionate distribution of funds will permit, utilizing the remaining provisions of the Bateman Act.

The court will retain jurisdiction for such modification or further order as may be required. See *Switz* v. *Middletown Township, supra*, 23 N.J. at pages 598–599, 614.

Nothing herein shall be construed as requiring the legislature to adopt a specific system of financing or taxation. The legislature may approach the goal required by the education clause by any methods reasonably calculated to accomplish that purpose consistent with the equal protection requirements of law.

While equalizing tax burdens may be readily accomplished by known means, it may be more difficult to assure that additional school funds will actually result in improved education. No purpose would be served by simply bidding up the cost of the same services without the expectation of improvement. Education must be raised to a "thorough" level in all districts where deficiencies exist. The legislature, the State board, the Bateman committee, educators in this State have defined this goal in commendable terms. See part I, above. The State board and the commissioner have amply statutory power to measure progress and to enforce this mandate by rule and regulation. Equalizing the tax burden in support of these purposes is a more certain goal. The New Jersey constitution demands that both goals be attained.

An appropriate order for judgment shall be submitted. It shall include specific provisions to assure the validity and enforceability of past and future acts and obligations incurred under existing laws as long as they remain operative.

APPENDIX A

(See text for explanation of terms)

* = Total
NA = Not Applicable

	Equalized Valuation Per Pupil, 1971 1	Current Expense Per Pupil, 1971-72 2	Pupils Per Full Time Teachers, 1969-70 3	Teacher Salaries Per Pupil, 1969-70 4	Professional Staff Per 1,000 Weighted Pupils, 1969-70 5	Grade Span 6	Enrollment, September 30, 1971 7	Equalized School Tax Rate, 1971 8	Equalized Total Tax Rate, 1971 9	State Aid Per Pupil, 1971-72 10	State Aid Change Per Pupil, 1971-72 over 1970-71 11
STATE AVERAGE	$ 41,026	$1,009.62	19.8	$470.56	52.5	NA	1,498,174*	$2.12	$3.66	$165.02	$15.95
ATLANTIC COUNTY											
MARGATE	$ 78,108	$ 975.	22.0	$424.85	50.2	K-8	1,652	$1.12	$2.80	$104.53	$ 4.53
ATLANTIC CITY	42,026	780.	22.6	403.70	45.6	K-8-4	7,853	1.55	5.21	120.32	20.32
MAINLAND REG.	29,432	1,078.	19.6	509.50	47.1	9-12	1,535	(.86)	NA	204.96	15.51
ABSECON	26,888	729.	22.7	343.62	45.9	K-8	1,336	1.97	3.90	189.43	.00
GR. EGG HARBOR REG.	26,367	1,337.	15.3	622.11	58.6	9-12	2,488	(1.17)	NA	253.53	75.37
PLEASANTVILLE	17,063	706.	22.5	375.89	44.8	K-8-4	3,316	2.13	5.57	296.62	40.18
COUNTY AVERAGE	$ 36,103	$ 872.08	21.7	$400.22	47.5	NA	35,977*	$1.83	$4.10	$177.72	$18.21
BERGEN COUNTY											
TETERBORO	$62,598,621	$1,300.	NA	NA	NA	NA	1	$ .00	$ .56	$100.00	.00
ROCKLEIGH	919,317	1,737.	NA	NA	NA	NA	25	.10	.63	102.19	2.19
ENGELWOOD CLIFFS	145,132	1,663.	16.2	695.30	69.6	K-8	1,294	1.20	1.84	103.61	3.61
CARLSTADT – E. RUTHERFORD REG.	119,931	1,388.	NA	NA	NA	9-12	781	(.37)	NA	109.17	NA
EDGEWATER	110,565	1,209.	18.8	480.51	56.2	K-6-3	770	.73	1.59	106.55	6.55
RIDGEFIELD	85,206	1,338.	16.5	594.79	62.2	K-8-4	1,864	.57	1.01	104.61	4.61
ENGELWOOD	79,643	1,743.	14.8	708.86	75.4	K-8-4	3,974	2.07	3.99	105.36	5.36
HACKENSACK	79,626	1,464.	15.9	680.83	64.6	K-8-4	4,912	1.64	3.06	105.94	5.94
TENAFLY	76,665	1,471.	17.1	6[illegible].11	60.3	K-8-4	3,228	2.11	3.41	104.62	4.62
PARAMUS	72,347	1,339.	18.1	589.66	57.7	K-6-3-3	7,078	1.90	2.79	104.74	4.74
RIVER EDGE – ORADELL REG.	59,652	1,369.	17.2	645.92	55.3	7-9; 10-12	2,404	(1.34)	NA	108.08	8.08
RIDGEWOOD	51,063	1,403.	18.1	658.15	57.3	K-6-3-3	7,050	2.81	4.17	104.69	4.69
WESTWOOD REG.	45,347	1,081.	20.3	493.66	52.2	K-6-3-3	4,934	2.25	3.38	114.62	.00
DUMONT	39,289	1,020.	18.9	514.96	53.7	K-8-4	4,404	2.55	3.33	104.29	4.29
OAKLAND	35,396	1,075.	21.2	445.57	51.6	K-8	2,859	3.08	4.23	138.90	.00
WALDWICK	33,946	1,073.	20.7	482.59	50.9	K-6-6	3,086	2.94	4.93	152.15	.00
COUNTY AVERAGE	$ 60,283	$1,227.33	18.6	$541.17	56.2	NA	173,782*	$1.89	$3.03	$106.88	$ 4.20
BURLINGTON COUNTY											
NEW HANOVER	$ 94,849	$1,067.	15.6	$415.03	61.9	1-8	147	$ .82	$1.89	$104.20	$ 4.20
MOORESTOWN	44,406	1,210.	19.5	517.40	53.7	K-8-4	3,844	.61	3.67	104.93	4.93
BORDENTOWN REG.	35,811	1,270.	15.7	576.62	59.2	9-12	797	(.96)	NA	172.59	28.20
CINNAMINSON	28,480	882.	19.1	451.18	54.0	K-8-4	4,907	2.68	3.56	174.99	7.33
MOUNT HOLLY	19,651	897.	21.[illegible]	419.63	50.6	K-8	2,196	3.06	4.73	282.32	26.55
NO. BURLINGTON CO. REG.	14,959	1,015.	20.1	407.23	47.7	7-12	2,342	(1.00)	NA	318.52	31.46
PEMBERTON TWP.	9,484	786.	24.9	338.75	39.0	1-8-4	7,523	1.30	2.81	357.66	43.48
COUNTY AVERAGE	$ 25,077	$ 919.53	20.8	$421.43	49.8	NA	79,577*	$2.36	$3.46	$235.39	$14.69
CAMDEN COUNTY											
HADDONFIELD	$ 49,114	$1,065.	18.9	$478.46	55.0	K-8-4	2,681	$2.33	$4.05	$104.72	$ 4.72
CHERRY HILL TWP.	38,358	1,107.	19.2	453.17	54.3	K-8-4	17,780	2.76	4.20	123.75	.00
EASTERN CAMDEN REG.	29,647	1,072.	18.7	420.76	50.2	9-12	1,022	(.79)	NA	255.85	27.19
BLACK HORSE PIKE REG.	24,045	1,037.	17.9	461.19	50.8	9-12	3,345	(1.06)	NA	300.45	66.63
CAMDEN (CITY)	19,187	843.	22.2	368.86	46.5	K-6-3; 9-12	20,436	2.57	5.76	345.74	80.41
PINE HILL	13,364	691.	27.0	326.02	44.3	K-6	874	3.52	5.75	342.60	32.60
AUDUBON PARK	4,696	771.	27.2	293.96	44.3	K-8	322	5.59	9.79	428.78	51.27
COUNTY AVERAGE	$ 29,658	$ 912.22	21.1	$405.43	49.3	NA	97,722*	$2.47	$4.29	$214.82	$19.62

	Equalized Valuation Per Pupil, 1971 1		Current Expense Per Pupil, 1971-72 2	Pupils Per Full Time Teachers, 1969-70 3	Teacher Salaries Per Pupil, 1969-70 4	Professional Staff Per 1,000 Weighted Pupils, 1969-70 5	Grade Span 6	Enrollment, September 30, 1971 7	Equalized School Tax Rate, 1971 8	Equalized Total Tax Rate, 1971 9	State Aid Per Pupil, 1971-72 10	State Aid Change Per Pupil, 1971-72 over 1970-71 11
CAPE MAY COUNTY												
STONE HARBOR	$	515,261	$ 979.	14.5	$482.14	65.6	1-8	155	$ .17	$1.31	$104.66	$ 4.66
OCEAN CITY		140,751	956.	19.5	493.45	50.5	K-6-6	1,926	.72	2.62	105.60	5.60
CAPE MAY (CITY)		66,907	966.	21.3	378.38	59.3	K-6	312	1.71	4.30	102.67	2.67
LOWER CAPE MAY REG.		51,242	1,224.	19.7	439.21	46.8	7-12	1,140	(1.08)	NA	112.75	2.63
MIDDLE TWP.		29,779	926.	22.5	378.97	44.1	K-8-4	2,025	2.66	3.55	169.91	.00
WOODBINE		13,282	1,071.	20.0	368.93	51.5	K-8	445	3.75	5.15	378.38	63.11
COUNTY AVERAGE	$	89,330	$ 972.06	20.4	$423.31	49.7	NA	11,709*	$ .93	$2.62	$138.51	$ 8.45
CUMBERLAND COUNTY												
GREENWICH TWP.	$	33,431	$1,055.	18.3	$419.54	60.6	1-8	237	$2.59	$3.84	$199.74	$ .00
VINELAND		26,185	795.	24.6	355.21	42.2	K-6-3-3	10,910	2.44	4.26	204.20	26.12
BRIDGETON		18,735	803.	21.5	390.87	46.9	K-6-3-3	4,563	2.62	4.96	311.84	51.60
COMMERCIAL TWP.		12,765	787.	22.5	336.61	44.7	K-8	1,098	3.44	4.96	357.23	46.26
COUNTY AVERAGE	$	21,813	$ 786.27	23.0	$367.92	44.7	NA	29,331*	$2.47	$4.29	$254.93	$27.62
ESSEX COUNTY												
MILLBURN	$	99,653	$1,454.	16.9	$685.03	61.0	K-6-3-3	4,258	$1.43	$3.43	$104.68	$ 4.68
W. ESSEX REG.		62,129	1,479.	16.0	688.90	58.7	7-12	2,251	(1.05)	NA	107.54	7.54
SO. ORANGE – MAPLEWOOD		55,736	1,367.	19.0	622.23	55.3	K-6-3-3	7,881	2.37	5.23	104.85	4.85
MONTCLAIR		51,231	1,390.	18.5	579.76	57.6	K-8-4	7,534	2.52	5.23	105.00	5.00
BLOOMFIELD		49,816	1,060.	20.8	506.73	51.1	K-6-3-3	8,601	2.01	4.52	104.63	4.63
ORANGE		35,403	1,199.	19.4	514.14	56.5	K-8-4	4,325	2.72	6.67	118.72	18.72
E. ORANGE		31,278	966.	17.7	521.38	57.4	K-8-4	12,514	2.83	7.38	148.04	48.04
NEWARK		19,815	1,121.	18.8	454.96	53.2	K-6-3, 9-12	78,904	3.69	6.39	317.80	109.82
COUNTY AVERAGE	$	35,687	$1,146.68	18.8	$506.11	54.5	NA	179,617*	$2.64	$5.33	$202.58	$12.81
GLOUCESTER COUNTY												
GREENWICH TWP.	$	79,635	$1,012.	21.6	$441.69	49.6	K-8	1,349	$1.08	$2.10	$104.07	$ 4.07
LOGAN TWP.		54,928	1,175.	19.0	460.67	58.9	K-6	439	1.90	2.53	104.76	4.76
KINGSWAY REG.		28,577	984.	18.1	4[illegible].91	50.5	7-12	912	(1.30)	NA	230.25	34.75
GLASSBORO		26,285	1,011.	18.1	459.83	54.7	K-8-4	2,775	2.79	4.29	247.00	20.85
DEPT-FORD		21,094	804.	21.9	368.20	47.4	K-6-3-3	5,798	2.75	3.45	289.41	21.68
CLEARVIEW REG.		19,206	1,029.	17.3	504.97	54.1	7-12	1,599	(1.89)	NA	333.87	66.05
NATIONAL PARK		15,114	666.	23.3	317.20	49.5	K-6	499	3.53	4.58	322.15	18.87
COUNTY AVERAGE	$	26,558	$852.46	20.9	$405.92	49.4	NA	43,074*	$2.38	$3.46	$245.78	$20.29
HUDSON COUNTY												
SECAUCUS	$	119,172	$1,184.	18.8	$479.40	60.0	K-8	1,907	$1.10	$2.61	$104.16	$ 4.16
NO. BERGEN		54,029	823.	22.2	422.89	46.2	K-8-4	7,180	1.52	4.17	104.67	4.67
BAYONNE		46,949	1,031.	19.6	466.16	51.6	K-8-4	9,473	1.56	4.39	106.01	6.01
JERSEY CITY		26,786	897.	22.5	395.80	46.5	K-8-4	39,084	2.82	6.40	221.52	54.58
HOBOKEN		19,079	811.	22.1	433.59	47.6	K-6-3-3	7,981	2.77	7.03	293.68	40.82
COUNTY AVERAGE	$	35,588	$ 922.24	21.3	$427.92	48.8	NA	92,985*	$2.03	$4.83	$192.18	$35.47
HUNTERDON COUNTY												
TEWKSBURY	$	67,391	$1,061.	18.2	$421.52	58.9	K-8	587	$2.12	$2.89	$102.61	$ 2.61
FLEMINGTON – RARITAN REG.		48,124	1,060.	16.7	515.71	66.5	K-8	2,003	(2.01)	2.94	102.68	2.68
HUNTERTON CENT. REG.		46,959	1,515.	18.1	564.58	58.0	9-12	1,901	(1.00)	NA	110.82	10.82
CLINTON TWP.		39,218	1,008.	19.8	437.44	54.2	K-8	1,033	2.72	3.35	102.34	2.34
LAMBERTVILLE		23,351	870.	23.0	355.81	48.5	K-6	429	3.74	5.14	243.58	7.63
HAMPTON		15,756	902.	23.1	376.76	47.6	K-8	276	4.14	5.54	324.35	38.47
COUNTY AVERAGE	$	42,824	$1,127.62	19.0	$473.22	54.7	NA	18,074*	$2.34	$3.17	$132.95	$ 7.51

	Equalized Valuation Per Pupil, 1971 1	Current Expense Per Pupil, 1971-72 2	Pupils Per Full Time Teachers, 1969-70 3	Teacher Salaries Per Pupil, 1969-70 4	Professional Staff Per 1,000 Weighted Pupils, 1969-70 5	Grade Span 6	Enrollment, September 30, 1971 7	Equalized School Tax Rate, 1971 8	Equalized Total Tax Rate, 1971 9	State Aid Per Pupil, 1971-72 10	State Aid Change Per Pupil, 1971-72 over 1970-71 11
MERCER COUNTY											
PRINCETON REG.	$ 88,073	$1,521.	16.0	$617.79	66.1	K-8-4	4,025	$(1.71)	$3.25	$104.18	$40.64
HOPEWELL VALLEY REG.	49,788	1,041.	18.8	467.42	54.8	K-8-4	3,656	(2.11)	3.39	128.76	00
EWING TWP.	45,853	1,145.	12.6	526.63	53.9	K-6-3-3	5,543	2.05	3.37	104.96	4.96
TRENTON	20,724	1,013.	20.2	507.83	50.6	K-6-3-3	17,501	2.80	6.65	305.00	98.51
COUNTY AVERAGE	$ 39,066	$1,052.98	19.4	$487.63	53.0	NA	56,143*	$2.19	$4.00	$181.35	$24.64
MIDDLESEX COUNTY											
NO. BRUNSWICK	$ 80,013	$1,282.	19.7	$477.68	56.4	K-6-3	3,800	$1.59	$2.32	$103.98	$ 3.98
NEW BRUNSWICK	50,532	1,179.	18.3	537.72	56.2	K-6-3-3	5,432	1.74	3.20	106.51	6.51
METUCHEN	40,190	1,016.	20.6	446.12	51.3	K-8-4	3,465	2.17	3.43	107.05	4.27
PERTH AMBOY	36,888	985.	20.8	446.71	50.6	K-8-4	6,685	1.86	4.25	129.98	15.54
MADISON	25,505	1,089.	19.7	445.56	53.9	K-8-4	13,038	3.20	4.29	221.51	24.04
JAMESBURG	23,035	862.	21.9	404.55	47.1	K-8-4	993	2.57	4.06	249.77	15.99
COUNTY AVERAGE	$ 40,859	$1,047.44	19.7	$467.40	52.9	NA	128,486*	$1.88	$3.04	$130.38	$ 7.14
MONMOUTH COUNTY											
INTERLAKEN	$ 104,511	$1,486.	NA	NA	NA	NA	73	$ (.59)	$2.54	$104.78	$ 4.78
DEAL	95,886	1,746.	14.8	717.03	73.7	K-8	416	1.75	3.41	104.40	4.40
RUMSON	65,913	1,158.	19.5	501.82	53.6	K-8	1,073	1.97	3.47	111.28	00
RED BANK	55,974	1,488.	16.4	619.01	62.1	K-8	1,323	2.23	3.85	105.65	5.65
RUMSON-FAIRHAVEN REG.	53,272	1,461.	16.3	701.61	55.0	9-12	1,240	(1.1[illegible]	NA	108.78	2.50
WALL TWP.	41,638	1,116.	20.8	457.73	49.0	K-8-4	3,954	2.80	4.16	104.29	4.29
MIDDLETOWN TWP.	32,686	881.	22.4	425.94	46.5	K-6-3-3	13,964	2.47	3.86	154.43	.00
ASBURY PARK	31,399	1,293.	19.7	511.19	51.4	K-8-4	3,025	3.20	6.20	167.48	67.48
FREEHOLD REG.	31,160	1,396.	16.7	537.62	56.9	9-12	5,488	(1.19)	NA	222.45	42.24
MANALAPAN – ENGLISHTOWN REG.	24,532	874.	23.1	343.68	48.8	K-8	4,129	3.59	4.47	232.41	.00
UNION BEACH	18,966	890.	26.0	328.60	41.5	K-8	1,670	2.65	4.55	292.37	25.45
COUNTY AVERAGE	$ 35,963	$ 981.81	20.2	$456.55	51.5	NA	110,386*	$2.52	$3.97	$174.86	$10.58
MORRIS COUNTY											
HARDING TWP.	$ 145,084	$1,582.	14.6	$724.35	71.1	K-8	562	$ .95	$1.73	$103.55	$ 3.55
E. HANOVER	77,003	1,15[illegible].	19.8	453.08	56.0	K-8	1,554	1.73	2.43	102.12	2.12
HANOVER PARK REG.	73,398	1,58[illegible].	14.1	703.10	65.4	9-12	2,230	(.66)	NA	108.65	8.65
MADISON	49,351	1,234.	18.0	571.09	58.5	K-8-4	3,412	2.21	3.62	104.60	4.60
PARSIPPANY TROY HILLS	43,189	986.	19.6	478.62	54.2	K-8-4	11,227	2.19	3.19	103.74	3.74
W. MORRIS REG.	39,064	1,333.	17.7	532.14	52.6	9-12	2,443	(.82)	NA	146.95	31.30
DOVER	36,988	901.	20.6	451.90	51.1	K-8-4	3,063	2.00	3.13	106.13	6.13
MT. OLIVE	29,452	1,023.	17.8	469.34	61.7	K-8	2,789	2.87	3.57	158.83	9.89
VICTORY GARDENS	13,023	999.	NA	NA	NA	NA	282	4.52	5.50	293.92	.00
COUNTY AVERAGE	$ 46,245	$1,154.41	18.6	$503.63	56.5	NA	92,988*	$2.20	$3.24	$117.27	$ 4.13
OCEAN COUNTY											
MANTOLOKING	$ 432,084	$1,498.	NA	NA	NA	NA	69	$ .36	$1.42	$102.42	$ 2.42
LAVALETTE	214,483	1,317.	12.6	$735.58	82.3	K-8	257	.67	1.71	104.07	4.07
SOUTHERN REG.	173,605	1,350.	17.8	555.74	52.4	7-12	1,096	(.50)	NA	108.36	8.36
TOMS RIVER SCHOOLS	40,605	978.	21.5	434.56	49.0	K-8-4	14,786	2.47	3.53	143.88	.00
BRICK TWP.	38,580	1,018.	21.1	445.31	49.2	K-8-4	9,299	2.57	3.34	109.67	.00
LAKEHURST	10,709	733.	22.7	358.21	47.1	K-8	775	1.29	3.09	330.70	5.36
COUNTY AVERAGE	$ 48,683	$1,017.68	20.3	$449.74	51.5	NA	51,825*	$2.02	$3.16	$145.00	$ 5.82
PASSAIC COUNTY											
CLIFTON	$ 73,527	$ 961.	21.3	$466.70	47.6*	K-6-3-3	12,076	$1.24	$2.38	$104.84	$ 4.84
PASSAIC CO. REG.	61,249	1,354.	17.9	581.62	51.1	9-12	2,245	(.82)	NA	108.60	8.60
WAYNE TWP.	53,323	1,037.	20.6	442.97	51.7	K-8-4	12,258	1.93	3.22	104.12	4.12

	Equalized Valuation Per Pupil, 1971 1	Current Expense Per Pupil, 1971-72 2	Pupils Per Full Time Teachers, 1969-70 3	Teacher Salaries Per Pupil, 1969-70 4	Professional Staff Per 1,000 Weighted Pupils, 1969-70 5	Grade Span 6	Enrollment, September 30, 1971 7	Equalized School Tax Rate, 1971 8	Equalized Total Tax Rate, 1971 9	State Aid Per Pupil, 1971-72 10	State Aid Change Per Pupil, 1971-72 over 1970-71 11
PASSAIC COUNTY Continued											
LAKELAND REG.	34,970	1,223.	18.6	504.82	50.9	9-12	1,172	$ (.84)	NA	163.88	35.23
PASSAIC (CITY)	33,999	928.	20.4	431.50	51.1	K-6-3-3	8,622	2.14	4.00	135.12	33.84
PATERSON	23,232	857.	21.8	423.38	48.8	K-8-4	27,246	2.57	5.23	259.38	65.22
COUNTY AVERAGE	$ 42,721	$ 951.12	21.0	$441.62	49.9	NA	89,291*	$1.92	$3.47	$157.46	$17.74
SALEM COUNTY											
MANNINGTON	$ 41,834	$1,086.	16.6	$470.54	58.5	K-8	443	$1.77	$2.78	$168.56	$ .00
PENNSVILLE	32,273	1,098.	16.4	558.47	63.0	K-6-3-3	3,536	1.00	1.96	178.24	.00
WOODSTOWN – PILESGROVE REG.	26,584	800.	21.5	430.13	45.7	K-6-6	1,466	1.95	3.17	253.97	8.93
PENNS GROVE - UPPER PENNS NECK REG.	20,131	866.	20.6	418.84	49.8	K-8-4	2,952	2.95	4.74	315.36	38.36
SALEM (CITY)	17,351	933.	20.8	411.62	48.5	K-8-4	1,799	3.14	5.21	352.46	67.34
COUNTY AVERAGE	$ 24,217	$ 913.57	19.7	$441.90	51.6	NA	15,285*	$1.78	$3.00	$262.03	$22.46
SOMERSET COUNTY											
BEDMINSTER TWP.	$ 140,039	$1,497.	19.2	$546.80	55.8	K-8	479	$1.15	$1.94	$104.18	$ 4.18
BERNARDSVILLE	73,786	1,234.	18.1	535.22	56.5	K-6-6	1,368	1.75	2.89	104.93	4.93
WATCHUNG HILLS REG.	53,894	1,201.	17.2	579.00	65.0	9-12	1,831	(.80)	NA	108.73	8.73
SOMMERVILLE	45,157	1,181.	18.7	575.87	53.4	K-8-4	2,591	2.65	4.32	105.48	5.48
BRIDGEWATER – RARITAN REG.	41,181	1,120.	19.0	522.82	54.5	K-8-4	10,624	2.05	2.64	168.63	.00
BOUND BROOK	40,002	1,096.	18.6	514.53	53.9	K-8-4	1,915	2.45	3.87	105.27	5.27
SO. BOUNDBROOK	27,178	1,061.	18.1	475.25	57.7	K-8	965	2.84	4.06	186.73	.00
COUNTY AVERAGE	$ 44,456	$1,111.40	18.7	$507.35	55.8	NA	49,338*	$2.26	$3.23	$123.12	$ 3.39
SUSSEX COUNTY											
SANDYSTON WALPACK	$ 88,507	$1,499.	18.3	$517.25	55.4	1-8	338	$1.33	$2.42	$104.51	$ 4.51
VERNON TWP.	60,892	1,140.	21.5	412.35	51.7	K-8	1,875	2.12	3.37	103.45	3.45
HIGH PT. REG.	47,683	1,642.	14.9	682.83	62.4	9-12	788	(1.75)	NA	120.89	.00
SPARTA	42,794	1,303.	19.8	499.06	52.6	K-6-3-3	3,005	2.72	4.53	104.52	4.52
HOPATCONG	32,422	959.	19.0	420.45	55.9	K-8-3	2,857	3.24	4.98	112.12	12.12
STANHOPE	24,046	956.	21.8	391.61	49.7	K-8	789	3.19	5.55	258.76	11.81
COUNTY AVERAGE	$ 41,477	$1,114.56	19.4	$473.53	54.1	NA	21,207*	$2.46	$4.08	$125.45	$ 6.70
UNION COUNTY											
LINDEN	$ 88,041	$1,203.	18.9	$542.40	56.4	K-6-3-3	7,232	$1.14	$2.04	$105.64	$ 5.64
SUMMIT	68,498	1,230.	16.5	633.24	61.9	K-6-3-3	4,901	1.82	3.07	104.61	4.61
UNION CO. REG.	57,898	1,435.	18.7	570.43	57.8	9-12	5,665	(.81)	NA	100.32	9.32
ELIZABETH	43,920	1,038.	20.5	458.72	60.6	K-6-3-3	15,990	1.88	3.81	128.93	28.93
PLAINFIELD	31,220	1,093.	19.9	500.72	54.2	K-6-3-3	9,678	3.21	5.61	145.46	37.18
WINFIELD	3,921	1,253.	19.4	474.33	56.7	K-8	357	15.11	20.14	501.51	115.95
COUNTY AVERAGE	$ 52,020	$1,111.42	19.3	$515.19	54.2	NA	104,096*	$1.91	$3.24	$114.61	$ 7.54
WARREN COUNTY											
HARDWICK	$ 74,800	$ 820.	NA	NA	NA	NA	87	$1.27	$2.64	$100.00	$ .00
NO. WARREN REG.	49,380	1,332.	NA	NA	NA	7-12	665	(.70)	NA	108.24	8.24
HACKETTSTOWN	32,928	1,116.	19.5	447.42	52.6	K-8-4	2,078	3.43	5.00	164.11	.00
WARREN HILLS REG.	31,833	1,031.	18.4	461.58	49.8	7-9; 10-12	1,649	(1.21)	NA	233.97	.00
PHILLIPSBURG	21,338	732.	23.9	372.95	41.8	K-8-4	3,506	2.18	4.09	237.92	21.24
OXFORD	18,487	895.	18.2	414.96	54.5	K-8	443	2.88	3.94	286.56	31.73
COUNTY AVERAGE	$ 32,596	$ 941.07	20.9	$406.59	49.4	NA	17,281*	$2.21	$3.46	$174.45	$ 6.41

McINNIS *v.* SHAPIRO

293 F.Supp. 327 (1968)

JUDGMENT AFFIRMED—March 24, 1969

See 89 S.Ct. 1197

Cecil C. Butler, Edward G. Thomson, Stanley A. Bass and Zane M. Cohn, Community Legal Counsel, and Curtis Heaston and Leo Holt, Cook County Legal Assistance Foundation, Inc., Chicago, Ill., *for plaintiffs.*

William G. Clark, attorney general, and Thomas E. Brannigan and Peter C. Alexander, assistant attorneys general, Chicago, Ill., *for defendants.*

Harry S. Miller, Chicago, Ill., for *amici curiae.*

Before Hastings, *Circuit Judge*, and Decker and Marovitz, *District Judges.*

Decker, *District Judge.*

This is a suit filed by a number of high school and elementary school students attending school within four school districts of Cook County, Ill., on behalf of themselves and all others similarly situated challenging the constitutionality of various State statutes dealing with the financing of the public school system.[1]

Plaintiffs claim that these statutes [2] violate their 14th amendment rights to equal protection and due process because they permit wide variations in the expenditures per student from district to district, thereby providing some students with a good education and depriving others, who have equal or greater educational need. Plaintiffs claim to be members of this disadvantaged group.

To correct this inequitable situation, they seek a declaration that the statutes are unconstitutional and a permanent injunction forbidding further distribution of tax funds in reliance on these laws.

The defendants are State officials charged with the administration of the legislation which allegedly permits this discrimination.

A three-judge district court was convened pursuant to 28 U.S.C. sections 2281 and 2284. Defendants then moved to dismiss the complaint (1) for lack of jurisdiction and (2) for failure to state a cause of action.

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[1] There is also a corporate plaintiff, Concerned Parents and People of the West Side, which was organized to improve the quality of educational facilities available to the citizens of an area within Chicago popularly known as "Lawndale."

[2] Specifically, the students challenge the following parts of 1967 Ill.Rev.Stat. ch. 12: §§ 11-1, 11-6, 11-9, 18-1 through 18-4, 18-8 through 18-14, 295, 34-22 through 34-29, and 34-42 through 34-82. Also questioned are ch. 122, articles 17, 19, and 32, and ch. 85 §§ 851 through 851.5d.

We conclude that we have jurisdiction. After examining the complaint, and studying the extensive briefs filed by the respective parties as well as the brief of the amici curiae,[3] we further conclude that no cause of action is stated for two principal reasons: (1) the 14th amendment does not require that public school expenditures be made only on the basis of pupils' educational needs,[4] and (2) the lack of judicially manageable standards makes this controversy nonjusticiable. After explaining the structure of the existing Illinois legislation, this opinion will discuss these two conclusions in detail.

I—JURISDICTION

The Federal courts have jurisdiction over the subject matter of this controversy. As stated in *Baker* v. *Carr*, 369 U.S. 186, 200, 82 S.Ct. 691, 701, 7 L. Ed.2d 663 (1962):

> Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the Federal judicial power defined in Article III, section 2, and so within the power of Congress to assign to the jurisdiction of the district courts.[5]

Similarly, the allegations do not present a political question because there is no potential conflict between coordinate branches of the Federal Government.[6] Both the equal protection and the due process clauses have long been used to scrutinize State legislative action. See, for example, *Williamson* v. *Lee Optical of Oklahoma*, (348 U.S. 483, 488–489, 75 S.Ct. 461, 99 L.Ed. 563 (1955)).[7]

II—THE FINANCING OF ILLINOIS' PUBLIC SCHOOLS

The General Assembly has delegated authority to local school districts to raise funds by levying a tax on all property within the district. In addition, the school districts may issue bonds for constructing and repairing their buildings. Legislation limits both the maximum indebtedness and the maximum tax rate which localities may impose for educational purposes. In 1966–67, the approximately 1,300 districts had roughly $840 per pupil with which to educate their students, of which about 75 percent came from local sources, 20 percent was derived from State aid, and 5 percent was supplied by the Federal Government. Since the financial ability of the individual districts varies substantially, per pupil expenditures vary between $480 and $1,000. State statutes which permit such wide variations allegedly deny the less fortunate Illinois students of their constitutional rights.

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[3] The following five organizations filed a brief in support of the complaint as amici curiae: American Jewish Congress, League of Women Voters of Illinois, South Suburban Human Relations Council, National Association of Social Workers, and Inter-Community Programs, Inc.

[4] While the complaining students repeatedly emphasize the importance of pupils' "educational needs," they do not offer a definition of this nebulous concept. Presumably, "educational need" is a conclusory term, reflecting the interaction of several factors such as the quality of teachers, the students' potential, prior education, environmental and parental upbringing, and the school's physical plant. Evaluation of these variables necessarily requires detailed research and study, with concomitant decentralization so each school and pupil may be individually evaluated. See pages 333 and 335, infra.

[5] See also Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed.939 (1949); Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946).

[6] "[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" 369 U.S. 210, 82 S.Ct. 706. See also Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). But see Coleman v. Miller, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939).

[7] See also Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 79 S.Ct. 473, 3 L.Ed.2d 480 (1959); Brown-Forman Co. v. Commonwealth of Kentucky, 217 U.S. 563, 30 S.Ct. 578, 54 L.Ed. 883 (1910).

Article VIII, section 1 of the Illinois Constitution, S.H.A. requires the legislature to "provide a thorough and efficient system of free schools, whereby all children of this State may receive a good common school education." Accordingly, a State common school fund supplements each district's local property tax revenues, guaranteeing a foundation level of $400 per student. The common school fund has two main components: (1) a flat grant to districts for each pupil, and (2) an equalization grant awarded to each district which levies a minimum property tax rate.[8] The equalization grant is calculated on the assumption that the district only assesses the minimum rate. Total revenues from the State common school fund account for about 15–18 percent of all districts' income.

The local tax revenue per student which is necessarily generated by the preceding minimum rate [9] is added to the flat grant per pupil. If this sum is less than $400, the difference is the equalization grant. Therefore, every district levying the minimum rate is assured of at least $400 per child. On the other hand, if a locality desires to tax itself more heavily than the minimum rate, it is not penalized by having the additional revenue considered before determination of the equalization grant. Since the hypothetical calculation uses the same tax rate for all localities, the assumed revenue per child depends upon the total assessed property value in a district and the number of students. Thus, the equalization grant tends to compensate for variations in property value per pupil from one district to another.

Finally, numerous special programs, both State and Federal, supply about 10 percent of the districts' revenues. This "categorical aid" is allocated for particular purposes such as bus transportation or assistance to handicapped and disadvantaged children. Plaintiffs do not challenge these programs, conceding that they are rationally related to the educational needs of the students.[10]

III—The Fourteenth Amendment: Equal Protection and Due Process

The underlying rationale of the complaint is that only a financing system which apportions public funds according to the educational needs of the students satisfies the 14th amendment.[11] Plaintiffs assert that the distribution of school revenues to satisfy these needs should not be limited by such arbitrary factors as variations in local property values or differing tax rates.

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[8] Over 97% of the districts qualify for the equalization grant. The flat grant, accounting for about one-third of the state aid, is now $47 per elementary student and $54.05 per high school pupil.

[9] Specifically, the qualifying rate is multiplied by the average assessed property valuation per pupil to obtain a minimum income from local taxation.

[10] For a more detailed description of Illinois' public school financing, see generally Task Force on Education, Education For The Future of Illinois, ch. VII (1966).

Clearly, there are wide variations in the amount of money available for Illinois school districts, both on a per pupil basis and in absolute terms. Presumably, students receiving a $1,000 education are better educated that those acquiring a $600 schooling.[12] While the inequalities of the existing arrangement are readily apparent, the crucial question is whether it is unconstitutional. Since nearly three-quarters of the revenue comes from local property taxes, substantially equal revenue distribution would require revamping this method of taxation, with the result that districts with greater property values per student would help support the poorer districts.

A—SOCIAL POLICY

While the state common school fund tends to compensate for the variations in school districts' assessed valuation per pupil, variation in actual expenditures remains approximately 3.0 to 1, 2.6 to 1, and 1.7 to 1 for elementary, high school, and unit districts respectively. Though districts with lower property valuations usually levy higher tax rates, there is a limit to the amount of money which they can raise, especially since they are limited by maximum indebtedness and tax rates. Plaintiffs argue that State statutes authorizing these wide variations in assessed value per student are irrational, thus violating the due process clause. Moreover, under the equal protection clause, the students contend that the importance of education to the welfare of individuals and the Nation requires the courts to invalidate the legislation if potential, alternative statutes incorporating the desirable aspects of the present system can also achieve substantially equal per pupil expenditures.[13]

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[11] Although plaintiffs stress the alleged denial of equal protection, they seek relief resembling substantive due process. Surely, quality education for all is more desirable than uniform, mediocre instruction. Yet if the Constitution only commands that all children be treated equally, the latter result would satisfy the Fourteenth Amendment. Certainly, parents who cherish education are constitutionally allowed to spend more money on their children's schools, be it by private instruction or higher tax rates, than those who do not value education so highly. Thus, the students' goal is presumably a judicial pronouncement that each pupil is entitled to a minimum level of educational expenditures, which would be significantly higher than the existing $400.

[12] These figures probably understate the national discrepancies. See, e.g., Levi, "The University, The Professions, and The Law—An Address," 56 Calif.L.Rev. 251, 258 (1968).

"The average current expenditures in 1965 for the East South Central states was 354 dollars per pupil in the primary and secondary public schools. The comparable figure was 732 dollars in the Middle Atlantic states. * * * These discrepancies also occur * * * between suburbs surrounding a single city. For example, the expenditure per high school pupil in a suburb to the north of Chicago is 1,283 dollars; in a suburb to the south of the city it is 723 dollars. The expenditure per elementary school pupil in a northern suburb is 919 dollars; in a southern suburb it is 421 dollars." See also National Education Association, Rankings of The States, 1966, page 51 (1966).

[13] Thus, the students advocate a doctrine similar to the close scrutiny given laws which infringe First Amendment rights. See, e.g., Kevishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

Illustrating how the school financing could be improved, plaintiffs suggest two alternatives: [14] (1) all students might receive the same dollar appropriations, or (2) the State could siphon off all money in excess of $ x per pupil which was produced by a given tax rate, in effect eliminating variations in local property values while leaving the districts free to establish their own tax rate.[15]

Without doubt, the educational potential of each child should be cultivated to the utmost, and the poorer school districts should have more funds with which to improve their schools. But the allocation of public revenues is a basic policy decision more appropriately handled by a legislature than a court. To illustrate, the following considerations might be relevant to a financing scheme: statewide variations in costs and salaries, the relative efficiency of school districts, and the need for local experimentation.

As stated in *Metropolitan Casualty Insurance Co.* v. *Brownell*,[16] (294 U.S. 580, 584, 55 S.Ct. 538, 540, 79 L.Ed. 1070 (1935)):

> [T]he burden of establishing the unconstitutionality of a statute rests on him who assails it * * * A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.

And more recently, the Supreme Court declared that:

> "[T]he 14th amendment permits the State a wide scope of discretion inenacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on the grounds of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.

McGowan v. *Maryland*, (366 U.S. 420, 425–426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961)).[17] See also *Salsburg* v. *Maryland*, 346 U.S. 545, 552–553, 74 S.Ct. 280, 98 L.Ed. 281 (1954)).[18]

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[14] Plaintiffs' suggestions arguably go no further than the upheavals recently created by bussing pupils and redrawing district boundaries in order to achieve racial balance. Except where localities attempted to avoid Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), however, these changes were accomplished legislatively rather than judicially.

[15] For example, if a district only levied a 1% tax rate, it could keep only $400 per pupil, regardless of the absolute dollars produced. On the other hand, the state would also guarantee $400 per pupil to units imposing the 1%. At higher rates, such as 4%, the state would thus substantially aid districts with low valuations, deriving most of its funds from wealthy districts which produced far more than $400 per pupil by a 1% rate.

[16] In Metropolitan Co., the Court upheld a state regulatory statute which distinguished between domestic and foreign casualty insurance companies, finding that differences in the security and collection of claims against the two groups may have justified differential treatment.

[17] Sunday laws were sustained even though First Amendment rights were involved and despite the availability of less onerous alternatives for providing a day of rest and recreation.

[18] "We do not sit as a superlegislature or a censor.

* * * * * * *

"We find little substance to appellant's claim that distinctions based on county areas are necessarily so unreasonable as to deprive him of the equal protection of the laws guaranteed by the Federal Constitution.

"* * * Territorial uniformity is not a constitutional requisite." 346 U.S. 550–552, 74 S.Ct. 283.

Tested by these standards, the existing school legislation is neither arbitrary nor does it constitute an invidious discrimination.[19] It therefore complies with the 14th amendment.

In the instant case, the general assembly's delegation of authority to school districts appears designed to allow individual localities to determine their own tax burden according to the importance which they place upon public schools. Moreover, local citizens must select which municipal services they value most highly. While some communities might place heavy emphasis on schools, others may cherish police protection or improved roads. The State legislature's decision to allow local choice and experimentation is reasonable, especially since the common school fund assures a minimum of $400 per student.[20]

Plaintiffs stress the inequality inherent in having school funds partially determined by a pupil's place of residence, but this is an inevitable consequence of decentralization. The students also object to having revenues related to property values, apparently without realizing that the equalization grant effectively tempers variations in assessed value by using a hypothetical calculation. Furthermore, the flat grants and State and Federal categorical aid reduce the school's dependence on local taxes. While alternative methods might be superior to existing legislation,

> To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require rough accommodations—illogical, it may be, and unscientific. * * * Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the 14th amendment.

Metropolis Theater Co. v. *City of Chicago*, 228 U.S. 61, 69–70, 33 S.Ct. 441, 57 L.Ed. 730 (1913).[21]

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[19] See also Allied Stores of Ohio v. Bowers, 358 U.S. 522, 527–528, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959) (exemption of certain merchandise from state taxation upheld under the equal protection clause); Brown-Forman Co. v. Commonwealth of Kentucky, 217 U.S. 563, 573, 30 S.Ct. 578, 580, 54 L.Ed. 883 (1910): "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

[20] While condemning the present distribution system, plaintiffs concede the virtue of decentralization, as follows:

"Decentralized administration and decision-making are desirable for administrative and political reasons. A division of the state into local school districts is therefore necessary. The voters in any particular area are best able to weigh convenience, the desired degree of homogeneity in the student body, and other factors These voters are the best able to draw school district boundaries Once these boundaries are drawn, the administrators or residents of the district, being closest to the problem, are best able to determine the educational needs of the district's children. That decision takes the form of support for a certain tax rate. Sometimes, this decentralized decision-making in creating districts or in adopting a tax rate will result in insufficient distribution of educational services. When that occurs the state in recognition of its ultimate responsibility provides sufficient funds to purchase 'basic' education for each child. Four hundred dollars per pupil is the figure necessary to support a 'basic' educational program. Of course, any disadvantage is outweighed by the values of decentralized administration and decision-making."

[21] Differential theatre license fees based on the price of admission, rather than on profit revenue, satisfied the equal protection clause.

Plaintiffs also attack numerous details of the present legislative scheme, such as the uniform maximum tax rate for both elementary and high schools. Allegedly, high schools need more money than elementary schools; but the answer is the increased number of students attending high schools may provide the additional funds. Also, plaintiffs complain that the maximum tax rate for the city of Chicago is about half that for the remaining school districts. Since the city is so much larger than other districts, however, distinctive legislation is appropriate to adjust for potential efficiencies.[22] The maximum tax rates which plaintiffs object to were enacted to avoid another disaster such as that which struck certain localities during the Great Depression; the possibility of similar economic crises supports the statutory ceilings.

In each of the instances where particular statutory provisions have been criticized by plaintiffs we can find a legitimate legislative policy. Where differences do exist from district to district, they can be explained rationally. The charges made in the complaint fall short of demonstrating either an arbitrary exercise of legislative power or an invidious discrimination. Under these circumstances, there can be no denial of any 14th amendment rights.

Moreover, the legislature is constantly upgrading the quality of education. For example, the foundation level was recently revised from the 1965–66 level of $330 to the present $400. Also, the General Assembly has substantially consolidated the school districts, reducing the 11,955 which existed in 1945 to approximately 1,340 today. Recently a legislative study commission suggested that educational television be introduced in the schools and that the foundation level be raised to $435. See Report of the School Problems Commission No. 7, p. 76–77 (1963).[23]

B.—PLAINTIFF'S LEGAL PRECEDENT

The complaining students rely upon recent Supreme Court decisions in the fields of school desegregation,[24] voting rights,[25] and criminal justice.[26] Specifically, they contend that "equal educational opportunity," however that term may be defined is constitutionally compelled because (1) State discrimination in education may not be based on color, (2) the State may not employ arbitrary geographical lines to establish electorial units within local governments, and (3) wealth may not be used to differentiate among criminal defendants if such discrimination is adverse to the indigent.[27]

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[22] See, e. g., Latham v. Board of Education, 31 Ill.2d 178, 184, 201 N.E.2d 111 (1964.)

[23] In addition, the Task Force on Education, sponsored in 1966 by then Governor Kerner and the legislature's School Problems Commission, recently proposed a plan of state financial support whereby each elementary student would receive a minimum of $600 and each high school student $750. Task Force on Education, Education For The Future of Illinois, p. 113, 135 (1966). Compare McLure, A Study of the Public Schools in Illinois (1965).

[24] See, e.g., Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); Griffin v. County School Board, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964).

[25] See, eg., Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed2d 663 (1962); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); Avery v. Midland County, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968).

[26] See, e.g., Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

But the plaintiffs' conclusion does not follow so readily from the preceding building blocks. The decided cases established significant, but limited principles. To illustrate, *Brown* v. *Board of Education* was primarily a desegregation case. Although placed in the context of public schools, it does not undermine the validity of Illinois' public financing. Similarly, *Hobsen* v. *Hansen*, 269 F.Supp. 401 (D.D.C. 1967), struck down variations in expenditures because the classifying factor was race.[28] The holding in *Douglas* v. *California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), derived primarily from its criminal justice setting, rather than the poverty of the defendant. Moreover, *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), strengthened citizens' voting rights because the Constitution specifically enfranchises all citizens equally, not as a result of general antipathy to historical geographical divisions.

Actually, there is little direct precedent because the contentions now presented are novel. But, the few relevant cases indicate that plaintiffs must resort to the legislature rather than the courts. The students are not deprived of their civil rights under 28 U.S.C. § 1343 because the asserted guarantee does not exist under the Constitution. *LeBeauf* v. *State Board of Education*, 244 F.Supp. 256, 260 (E.D.La.1965), held:

> There simply is no right, privilege, or immunity secured to these plaintiffs by the Constitution and laws of the United States being in any way denied by these respondents when they allocate and disburse funds. . . .[29]

Similarly, in *Hess* v. *Mullaney*, 213 F.2d 635, 15 Alaska 40 (9th Cir. 1954), the ninth circuit upheld a property tax which returned a disproportionately small amount of funds to the taxpayers' locality.[30] Since this tax also supported the public schools, the plaintiffs, instant claim is analogous. See also *General American Tank Car Corp.* v. *Day* 270 U.S. 367, 46 S.Ct. 234, 70 L.Ed. 635 (1926).[31] Compare *Dean* v.

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[27] See generally Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," 35 U.Chi.L.Rev. 583, 586 (1968).

[28] Of course, if plaintiffs alleged that Illinois' legislation was designed to avoid the Supreme Court's racial desegregation decisions, they would state a cause of action. See Griffin v. County School Board, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964).

[29] Although the primary thrust of the complaint was directed against local segregation, the court squarely confronted the question now before this court, sustaining state legislation which provided that:

"[A] large portion of the funds so allocated must be apportioned on a per educable basis, and the remaining distribution is made on a basis of equalization so as to provide and insure a minimum educational program in all public schools.' 244 F.Supp. 258.

[30] "It is argued that * * * in effect it [the taxation formula] amounts to an exemption from the tax of all this property within cities and districts * * *

* * * * * * *

"* * * No requirements of uniformity or of equal protection of the law limit the power of a legislature in respect to allocation and distribution of public funds" 213 F.2d 639–640.

[31] "We are not concerned with the particular method adopted by Louisiana of allocating the tax between the State and its political subdivisions. That is a matter within the competency of the state legislature." 270 U.S. 372, 46 S.Ct. 235.

See Columbia Southern Railway v. Wright, 151 U.S. 470, 476–477, 14 S.Ct. 396, 38 L.Ed. 238 (1894).

Coddlington, 81 S.D. 140, 131 N.W.2d 700 (1964); *Sawyer* v. *Gilmore*, 109 Me. 169, 83 A. 673 (1912); *Orleans Parish* v. *State Board*, 215 La. 703, 41 So.2d 509 (1949).[32]

IV—LACK OF JUDICIALLY MANAGEABLE STANDARDS

Even if the 14th amendment required that expenditures be made only on the basis of pupils' educational needs, this controversy would be nonjusticiable. While the complaint does not present a "political question" in the traditional sense of the term, there are no "discoverable and manageable standards"[33] by which a court can determine when the Constitution is satisfied and when it is violated.[34]

The only possible standard is the rigid assumption that each pupil must receive the same dollar expenditures. Expenses are not, however, the exclusive yardstick of a child's educational needs. Deprived pupils need more aid than fortunate ones.[35] Moreover, a dollar spent in a small district may provide less education than one used in a large district. As stated above, costs vary substantially throughout the State. The desirability of a certain degree of local experimentation and local autonomy in education also indicates the impracticability of a single, simple formula. Effective, efficient administration necessitates decentralization so that local personnel, familiar with the immediate needs, can administer the school system. As new teaching methods are devised and as urban growth demands changed patterns of instruction, the only realistic way the State can adjust is through legislative study, discussion and continuing revision of the controlling statutes. Even if there were some guidelines available to the judiciary, the courts simply cannot provide the empirical research and consultation necessary for intelligent educational planning.[36] As early as 1919 Mr. Justice Holmes explained that "the 14th amendment is not a pedagogical requirement of the impracticable." *Dominion Hotel* v. *Arizona*, 249 U.S. 265, 268, 39 S. Ct. 273, 274, 63 L. Ed. 597 (1919).

Plaintiffs have assumed that requiring expenditures to be related to the needs of the students will result in better education for deprived students without a corresponding decrease in the quality of education now offered by the affluent districts. The more money the latter districts must supply to the former, however, the less incentive the well-to-do will have to raise their tax rates. If the quality of good public schools declines, affluent children have the option to attend private schools,[37] thus completely eliminating the need for the wealthy to raise taxes.[38]

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[32] Moreover the students are arguably complaining only about a property interest, rather than their personal liberty, so that the grievance does not fall within section 1843. With more money, plaintiffs could either attend private schools or move to a wealthy school district. See generally Gray v. Morgan, 371 F.2d 172, 174 (7th Cir. 1966). See also Abernathy v. Carpenter, 208 F.Supp. 793 (W.D.Mo. 1962), affirmed 373 U.S. 241, 83 S.Ct. 1295, 10 L.Ed.2d 409 (1963).

[33] Reynolds v. Sims, 377 U.S. 533, 557, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

[34] Illustrating the lack of standards, plaintiffs' original complaint sought to have this court "order defendants to submit * * * a plan to raise and apportion all monies * * * in such a manner that such funds available to the school districts wherein the class of plaintiffs attend school will * * * assure that plaintiffs children receive the same educational opportunity as the children in any other district * * *."

[35] Ideally, disadvantaged youth should receive more than average funds, rather than equal expenditures, so their potential can be fully developed. A rule coercing equal expenditures for all, especially if raised to a constitutional plane, would completely frustrate this ideal. See generally Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," 35 U.Chi.L. Rev. 583, 591 (1968).

[36] Compare Baker v Carr, 369 U.S. 186, 282 & 323, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); Colegrove v. Green, 328 U.S. 549, 556, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946); Coleman v. Miller, 307 U.S. 433, 454–455, 59 S.Ct. 972, 83 L.Ed. 1385 (1939).

V.—CONCLUSION

The present Illinois scheme for financing public education reflects a rational policy consistent with the mandate of the Illinois Constitution. Unequal educational expenditures per student, based upon the variable property values and tax rates of local school districts, do not amount to an invidious discrimination. Moreover, the statutes which permit these unequal expenditures on a district-to-district basis are neither arbitrary nor unreasonable.

There is no constitutional requirement that public school expenditures be made only on the basis of pupils' educational needs without regard to the financial strength of local school districts. Nor does the Constitution establish the rigid guideline of equal dollar expenditures for each student.

Illinois General Assembly has already recognized the need for additional educational funds to provide all students a good education. Furthermore, the legislative school problems commission assures a continuing and comprehensive study of the public schools' financial problems. If other changes are needed in the present system, they should be sought in the legislature and not in the courts. Plaintiffs have stated no grounds for judicial relief, and this cause must be dismissed.

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[37] See Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

[38] Furthermore, the public schools' most acute financial crisis is in the large cities. But their struggles are only symptomatic of the overall decay of many urban centers. Despite the attempts of Congress and the state legislatures, the nation still does not have the solution to this degeneration, princically because there are not enough tax dollars to meet all needs. If the legislatures cannot solve these problems, surely the deep cutting edge of constitutional precepts is not the answer. Compare Avery v. Midland County, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968) (Mr. Justice Fortas' dissent).

HANSEN *v.* HOBSON

408 F.2d 175 (D.C. Cir. 1969)

Argued June 26, 1968—Decided Jan. 21, 1969

Appeal challenging the findings of the U.S. District Court for the District of Columbia, J. Skelly Wright, circuit judge, that board of education had in a variety of ways violated the Constitution in administering the District of Columbia schools. The court of appeals, Bazelon, chief judge, held, inter alia, that while opinions could differ as to source and magnitude of difference between educational opportunities offered by various schools in the District of Columbia, nevertheless when differentiating factor was as clear as overcrowding versus excess capacity, transportation to level off pupil density could fairly be required of the school board.

ORDER IN ACCORDANCE WITH OPINION

Danaher, Burger, and Tamm, circuit judges, *dissented;* McGowan, circuit judge, *dissented in part.*

Messrs. John L. Laskey and Edmund D. Campbell, Washington, D.C., with whom Messrs. F. Joseph Donohue and Thomas S. Jackson, Washington, D.C., where on the brief, for *appellants.*

Messrs. William M. Kunstler, New York City, and Richard J. Hopkins, with whom Mr. James O. Porter, Washington, D.C., was on the brief, for appellees. Mr. Jerry D. Anker, Washington, D.C., also entered an appearance for *appellees.*

Mr. E. Riley Casey, Washington, D.C., filed a brief on behalf of the National School Boards Association, as *amicus curiae*, urging reversal.

Mr. William B. Beebe, Washington, DC., filed a brief on behalf of the American Association of School Administrators, as *amicus curiae*, urging reversal.

Messrs. Howard C. Westwood and Albert H. Kramer, Washington, D.C. filed a brief on behalf of the National Education Association, as *amicus curiae*, urging affirmance.

Messrs. J. Francis Pohlhaus and Frank D. Reeves, Washington, D.C., filed a brief on behalf of the National Association for the Advancement of Colored People, as *amicus curiae*, urging affirmance.

Before Bazelon, *chief judge*, and Danaher, Burger, McGowan, Tamm, Leventhal and Robinson, circuit judges, sitting *en banc.*

Bazelon, chief judge, joined by Leventhal and Robinson, circuit judges, in part I; and by McGowan, Leventhal and Robinson, circuit judges, in parts II, III, and IV:

These appeals challenge the findings of the trial court that the Board of Education has in a variety of ways violated the Constitution in administering the District of Columbia schools.[1] Among the facts that distinguish this case from the normal grist of appellate courts is the absence of the Board of Education as an appellant. Instead, the would-be appellants are Dr. Carl F. Hansen, the resigned superintendent of District schools, who appeals in his former official capacity and as an individual; Carl C. Smuck, a member of the Board of Education, who appeals in that capacity; and the parents of certain school children who have attempted to intervene in order to register on appeal their "dissent" from the order below.

The school board's decision not to appeal inevitably adds a quality of artificiality to any proceedings in this court. But the importance of the constitutional issues at stake requires an examination of whether these appellants should, despite the absence of the protagonist at trial, be given their day in a higher court. Moreover, our reluctance to review an order unchallenged by the principal defendant below is in some measure tempered by the fact that the present appointed school board has been superseded by a new Board of Education elected last fall.[2] The most fundamental considerations demand that this new board should have the fullest discretion permitted by the Constitution to reshape educational policy within the District. This court cannot ignore the importance of assuring that the new school board should not be straitjacketed by an order not rooted in constitutional requirements. We conclude that the parents were properly allowed to intervene of right in order to appeal those provisions of the decree which curtail the freedom of the school board to exercise its discretion in deciding upon educational policy.

Taking up the contentions advanced by the parents, our disposition is as follows: In part II of this opinion we consider and reject certain procedural objections. In part III we affirm on the merits those parts of the district court's decree that relate to pupil busing, optional zones, and faculty integration. In part IV we conclude that the district court's rulings on the track system and on certain aspects of pupil assignment do not materially limit the discretion of the school board, and that accordingly the parents lack standing to challenge the factual and legal bases underlying these provisions of the decree—a disposition that imports no view by this court on the merits of the objections tendered by the parents on these issues.

I—STANDING TO APPEAL

The Board of Education, as a corollary of its decision to accept the order below, directed Dr. Hansen not to appeal. Nevertheless, after his resignation was submitted and accepted by the board, Dr. Hansen noted his appeal as superintendent of schools. Whatever standing he might have possessed to appeal as a named defendant in the original suit, however, disappeared when Dr. Hansen left his official position.[3]

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[1] Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

[2] District of Columbia Elected Board of Education Act, 82 Stat. 101 (1968).

[3] See Snyder v. Buck, 340 U.S. 15, 71 S.Ct. 93, 95 L.Ed. 15 (1950); Davis v. Preston, 280 U.S. 406, 50 S.Ct. 171, 74 L.Ed. 514 (1930).

Presumably because he was aware of this, he subsequently moved to intervene under rule 24(a) of the Rules of Civil Procedure in order to appeal as an individual. Although the trial judge found several reasons why such intervention should be denied, the motion was granted "in order to give the court of appeals an opportunity to pass on the intervention questions raised here. . . ."[4] We agree with the reasoning of the trial court as to Dr. Hansen rather than with its result. The original decision was not a personal attack upon Dr. Hansen, nor did it bind him personally once he left office. And while it may or may not be true that but for the decision Dr. Hansen would still be superintendent of schools, the fact is that he did resign. He does not claim that a reversal or modification of the order by this court would make his return to office likely. Consequently, the supposed impact of the decision upon his tenure is irrelevant insofar as an appeal is concerned, since a reversal would have no effect. Dr. Hansen thus has no "interest relating to the property or transaction which is the subject of the action" sufficient for rule 24(a), and intervention is therefore unwarranted.

We also find that Mr. Smuck has no appealable interest as a member of the Board of Education. While he was in that capacity a named defendant, the Board of Education was undeniably the principal figure and could have been sued alone as a collective entity. Appellant Smuck had a fair opportunity to participate in its defense, and in the decision not to appeal. Having done so, he has no separate interest as an individual in the litigation.[5] The order directs the board to take certain actions. But since its decisions are made by vote as a collective whole, there is no apparent way in which Smuck as an individual could violate the decree and thereby become subject to enforcement proceedings.

The motion to intervene by the parents presents a more difficult problem requiring a correspondingly more detailed examination of the requirements for intervention of right. As amended in 1966, rule 24(a)(2) permits such intervention:

> . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Before its recent amendment rule 24(a) contained two subdivisions requiring the petitioner to be "bound by a judgment in the action" or "so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."[6] As the trial judge pointed out in his decision to grant intervention to the parents, under the preamendment cases the task of defining what constitutes an "interest" was typically "subsumed in the questions of whether the petitioner would be bound or of what was the nature of his property interest."[7] The 1966 amendments were designed to eliminate the scissoring effect whereby a petitioner who could show "inadequate representation" was thereby thrust against the blade that he would therefore not be "bound by a judgment," and to recognize the decisions which had construed "property" so broadly as to make surplusage of the adjective.[8] In doing so, the amendments made the question of what constitutes an "interest" more visible without contributing an answer. The phrasing of rule 24(a)(2) as amended parallels that of rule 19(a)(2) concerning joinder. But the fact that the two rules are entwined does not imply that an "interest" for the purpose of one is precisely the same as for the other.[9] The occasions upon which a petitioner should be allowed to intervene under rule 24 are not necessarily limited to those situations when the trial court should compel him to become a party under rule 19. And while the division of rule 24(a) and (b) into "intervention of right" and "permissible intervention" might superficially suggest that only the latter involves an exercise of discretion by the court, the contrary is clearly the case.[10]

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[4] Hobson v. Hansen, 44 F.R.D. 18, 33 (D.D.C.1968).

[5] *See* Elterich v. Arndt, 175 Wash. 562, 27 P. 2d 1102 (1933); State ex rel. Erb v. Sweaas, 98 Minn. 17, 107 N.W. 404 (1906).

[6] Rule 24(a) (2) and (3), 28 U.S.C.A. (1958).

[7] 44 F.R.D. at 22.

The effort to extract substance from the conclusory phrase "interest" or "legally protectable interest" is of limited promise. Parents unquestionably have a sufficient "interest" in the education of their children to justify the initiation of a lawsuit in appropriate circumstances,[11] as indeed was the case for the plaintiff-appellee parents here. But in the context of intervention the question is not whether a lawsuit should be begun, but whether already initiated litigation should be extended to include additional parties. The 1966 amendments to rule 24(a) have facilitated this, the true inquiry, by eliminating the temptation or need for tangential expeditions in search of "property" or someone "bound by a judgment." It would be unfortunate to allow the inquiry to be led once again astray by a myopic fixation upon "interest." Rather, as Judge Leventhal recently concluded for this court:

> [A] more instructive approach is to let our construction be guided by the policies behind the "interest" requirement. . . . . [T]he "interest" test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.[12]

The decision whether intervention of right is warranted thus involves an accommodation between two potentially conflicting goals: To achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending. Since this task will depend upon the contours of the particular controversy, general rules and past decisions cannot provide uniformly dependable guides.[13] The Supreme Court, in its only full-dress examination of rule 24(a) since the 1966 amendments, found that a gas distributor was entitled to intervention of right although its only "interest" was the economic harm it claimed would follow from an allegedly inadequate plan for divestiture approved by the Government in an antitrust proceeding.[14] While conceding that the Court's opinion granting intervention in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.* "is certainly susceptible of a very broad reading," the trial judge here would distinguish the decision on the ground that the petitioner "did show a strong, direct economic interest, for the new company [to be created by divestiture] would be it sole supplier." [15] Yet while it is undoubtedly true that "*Cascade* should not be read as a carte blanche for intervention by anyone at any time," [16] there is no apparent reason why an "economic interest" should always be necessary to justify intervention. The goal of "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process" may in certain circumstances be met by allowing parents whose only "interest" is the education of their children to intervene. In determining whether such circumstances are present, the first requirement of rule 24(a)(2), that of an "interest" in the transaction, may be a less useful point of departure than the second and third requirements, that the applicant may be impeded in protecting his interest by the action and that his interest is not adequately represented by others.

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[8] *See* Notes of Advisory Committee on Rules, Rule 24, 28 U.S.C.A. (1967 Pocket Part).

[9] *See* Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv.L.Rev. 721, 757–759 (1968).

[10] *See id.;* see also Kaplan, Continuing Work of the Civil Committee; 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv.L.Rev. 356, 400–407 (1967).

[11] *See* Pierce v. Society of Sisters, 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L. Ed. 1070 (1925).

[12] Nuesse v. Camp, 128 U.S.App.D.C. 172, 385 F.2d 694, 700 (1967).

[13] For the efforts of one commentator, admittedly only partially successful, to classify the cases in which courts have found a sufficient "interest" for intervention under Rule 24, *see* Shapiro, *supra* note 9, at 729–740.

This does not imply that the need for an "interest" in the controversy should or can be read out of the rule. But the requirement should be viewed as a prerequisite rather than relied upon as a determinative criterion for intervention. If barriers are needed to limit extension of the right to intervene, the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task. If those requirements are met, the nature of his "interest" may play a role in determining the sort of intervention which should be allowed—whether, for example, he should be permitted to contest all issues, and whether he should enjoy all the prerogatives of a party litigant.[17]

Both courts and legislatures have recognized as appropriate the concern for their children's welfare which the parents here seek to protect by intervention.[18] While the artificiality of an appeal without the Board of Education cannot be ignored, neither can the importance of the constitutional issues decided below. The relevance of substantial and unsettled questions of law has been recognized in allowing intervention to perfect an appeal.[19] And this Court has noted repeatedly,

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[14] Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 132–136, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967).

[15] 44 F.R.D. at 24–25.

[16] *Id.* The majority's splenetic displeasure with the substantive provisions of the divestiture plan approved by the Government and the trial court may have been an important factor in the liberal rending given Rule 24(a) in *Cascade*. *See* Shapiro, *supra* note 9, at 729–731; Kaplan, *supra* note 10, at 403–407.

[17] *Cf.* Shapiro, *supra* note 9, at 740, 752–756.

[18] In providing for the first time for an elected school board in the District, Congress has recognized that "the education of their children is a municipal matter of primary and personal concern to the citizens of a community." District of Columbia Elected Board of Education Act § 2, 82 Stat. 101 (1968).

[19] *See* Pellegrino v. Nesbit, 203 F.2d 463, 467, 37 A.L.R.2d 1296 (9th Cir. 1953).

"obviously tailored to fit ordinary civil litigation, [the provisions of rule 24] require other than literal application in atypical cases." [20] We conclude that the interests asserted by the intervenors are sufficient to justify an examination of whether the two remaining requirements for intervention are met.

Rule 24(a) as amended requires not that the applicant would be "bound" by a judgment in the action, but only that "disposition of the action may as a practical matter impair or impede his ability to protect that interest." In *Nuesse* v. *Camp* [21] this Court examined a motion by a State commissioner of banks to intervene under the new rule 24(a) in a suit brought by a State bank against the U.S. Comptroller of Currency. The palintiff claimed that the defendant would violate the National Bank Act [22] if he approved the application of a national bank to open a new branch near the plaintiff's office. The intervenor feared an interpretation of the statute which would stand as precedent in any later litigation he might initiate. The Court, agreeing, concluded that "under this new test *stare decisis* principles may in some cases supply the practical disadvantage that warrants intervention as of right." [23] But if a decision interpreting a statute against the applicant's contentions would so handicap him in pursuing a subsequent lawsuit as to justify intervention, the appellants in this case would face a hopeless task in a later suit. The intervening parents assert that the Board of Education should be free to make policy decisions concerning such matters as pupil and faculty assignments without the constraints imposed by the decision below. If allowed to intervene, they hope to show that the past practices condemned by the trial court did not violate the Constitution and hence that the decree should be vacated. Should they succeed, the Board of Education will indeed be freed of certain constraints upon its exercise of discretion in establishing educational policy. But if the right to intervene is denied and the decision below becomes final, there is no apparent way for the parents to pursue their interests in a subsequent lawsuit. True, they could assert that the new policies adopted by the Board of Education in compliance with the order below are unconstitutional. But this would be a sterner challenge than they would face as intervenors here: Although the new policies might not be constitutionally required, they might also not be unconstitutional. Indeed, the very premise for the intervenors' attack on the trial court decision is that school authorities can exercise wide discretion without encountering affirmative constitutional duties or negative prohibitions. While the scope of this discretion is uncertain, its existence is not: Some policies may be constitutionally permissible, and hence immune to attack in a fresh lawsuit, which are not constitutionally required. Since this is so, the intervenors have borne their burden to show that their interests would "as a practical matter" be affected by a final disposition of this case without appeal.

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[20] Textile Workers Union, etc. v. Allendale Co., 96 U.S.App.D.C. 401, 403, 226 F.2d 765, 767 (1955) (en banc), cert. denied, Allendale Co. v. Mitchell, 351 U.S. 909, 76 S.Ct. 699, 100 L.Ed. 1444 (1956), cited in Nuesse v. Camp, 128 U.S.App.D.C. 172, 385 F.2d 694, 700 (1967).

[21] 128 U.S.App.D.C. 172, 385 F.2d 694 (1967).

[22] 12 U.S.C. § 36 (1964).

[23] 128 U.S.App.D.C. at 180, 385 F.2d at 702: *accord*, Atlantis Development Corp. v. United States, 379 F.2d 818, 828–829 (5th Cir. 1967).

The remaining requirement for intervention is that the applicant not be adequately represented by others. No question is raised here but that the Board of Education adequately represented the intervenors at the trial below; the issue rather is whether the parents were adequately represented by the school board's decision not to appeal. The presumed good faith of the board in reaching this decision is not conclusive. "[B]ad faith is not always a prerequisite to intervention,"[24] nor is it necessary that the interests of the intervenor and his putative champion already a party be "wholly 'adverse.'"[25] As the conditional wording of rule 24(a)(2) suggests in permitting intervention "unless the applicant's interest is adequately represented by existing parties," "the burden [is] on those opposing intervention to show the adequacy of the existing representation."[26] In this case, the interests of the parents who wish to intervene in order to appeal do not coincide with those of the Board of Education. The school board represents all parents within the District. The intervening appellants may have more parochial interests centering upon the education of their own children. While they cannot of course ask the Board to favor their children unconstitutionally at the expense of others, they like other parents can seek the adoption of policies beneficial to their own children. Moreover, considerations of publicity, cost, and delay may not have the same weight for the parents as for the school board in the context of a decision to appeal. And the Board of Education, buffeted as it like other school boards is by conflicting public demands, may possibly have less interest in preserving its own untrammeled discretion than do the parents. It is not necessary to accuse the board of bad faith in deciding not to appeal or of a lack of vigor in defending the suit below in order to recognize that a restrictive court order may be a not wholly unwelcome haven.

The question of adequate representation when a motion is made for intervention to appeal is related to the question of whether the motion is timely. To a degree it may well be true that a "strong showing" is required to justify intervention after judgment.[27] But by the same token a failure to appeal may be one factor in deciding whether representation by existing parties is adequate.[28] As the opinion of the trial court in granting intervention demonstrates, the leading cases in which intervention has been permitted following a judgment tend to involve unique situations.[29] The very absence of any precedent involving the same or even closely analogous facts requires a close examination of all the circumstances of this case. We conclude that the intervenor-appellants here have shown a sufficiently serious possibility that they were not adequately represented in the decision not to appeal.

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[24] Hobson v. Hansen, 44 F.R.D. 18, 31 (D.D.C.1968).

[25] Nuesse v. Camp, 128 U.S.App.D.C. 172, 181, 385 F.2d 694, 703 (1967).

[26] *Id.* at 180, 385 F.2d at 702.

[27] *See* United States v. Blue Chip Stamp Co., 272 F.Supp. 432, 435–436 (C.D. Calif. 1967) (collecting cases), aff'd Thrifty Shoppers Scrip Co. v U.S. 389 U.S. 580, 88 S.Ct. 693, 19 L.Ed.2d 781 (1968).

[28] *See* Zuber v. Allen, 128 U.S.App.D.C. 297, 387 F.2d 862 (1967); Pellegrino v. Nesbit, 203 F.2d 463, 37 A.L.R.2d 1296 (9th Cir. 1953); Wolpe v. Poretsky, 79 U.S.App.D.C. 141, 144 F.2d 505, cert. denied, 323 U.S. 777, 67 S.Ct. 69, 91 L.Ed. 627 (1944).

[29] *See* 44 F.R.D. at 31 & n. 11.

Our holding that the appellants would be practically disadvantaged by a decision without appeal in this case and that they are not otherwise adequately represented necessitates a closer scrutiny of the precise nature of their interest and the scope of intervention that should accordingly be granted. The parents who seek to appeal do not come before this court to protect the good name of the Board of Education. Their interest is not to protect the board, or Dr. Hansen, from an unfair finding. Their asserted interest is rather the freedom of the school board—and particularly the new school board recently elected [30]—to exercise the broadest discretion constitutionally permissible in deciding upon educational policies. Since this is so, their interest extends only to those parts of the order which can fairly be said to impose restraints upon the Board of Education. And because the school board is not a party to this appeal, review should be limited to those features of the order which limit the discretion of the old or new board.

II—PROCEDURAL ISSUES

Two additional procedural contentions raised by the appellants require attention. The first concerns the severance for trial by a three-judge district court under 28 U.S.C. 2282 (1964) of the first cause of action stated in the six-count complaint originally filed by the plaintiff-appellees. The appellants argue that since a three-judge court was required for the first county, which challenged the constitutionality of the then-existing statutory regime by which the judges of the U.S. District Court appointed the members of the Board of Education,[31] the remaining five counts had likewise to be submitted to a three-judge court although they challenged not the statute but only the school board's policies. We find the argument without merit for the reasons outlined by the author of this opinion in denying a motion by the defendants below to expand the jurisdiction of the three-judge court to include counts two through six.[32] The appellants rely chiefly upon *Florida Lime & Avocado Growers* v. *Jacobsen* [33] *and Zemel* v. *Rusk*.[34] In both those cases, however, the Supreme Court interpreted all of the contentions raised to constitute attacks upon the statutes involved. Success on any score would in each case have prevented enforcement of the statute. In this case, on the other hand, counts two through six were directed only at policies of the Board of Education. The success of the plaintiff-appellees did not and could not call into question the authority of the school board to carry out the responsibilities entrusted to it by the underlying statute, which the three-judge court had meanwhile found constitutional in dismissing count one.[35]

The appellants also contend that the trial judge erred in failing to excuse himself in response to the motion for voluntary displacement filed by the defendants below on the 14th day of trial. The motion was supported by exhibits consisting of an article by the trial judge dealing with legal remedies for de facto segregation,[36] an excerpt from the trial transcript purportedly showing that the trial judge had prejudged the merits of the defendants prospective motion for judgment, and articles and editorials in various newspapers and magazines commenting upon the supposed predilections of the trial judge dealing with the questions of law involved in the case.

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[30] *See* District of Columbia Elected Board of Education Act, 82 Stat. 101 (1968).

[31] Act of June 20, 1906, ch. 3446, § 2, 34 Stat. 316 (repealed 1968).

[32] Hobson v. Hansen, 256 F.Supp. 18 (D.C. 1966).

[33] 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960).

[34] 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965).

[35] Hobson v. Hansen, 265 F.Supp. 902 (D.D.C.1967).

[36] Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 40 N.Y.U.L.REV. 285 (1965).

Even assuming that the motion satisfied the requirements for an affidavit of bias or prejudice under 28 U.S.C. 144, (1964),[37] there is serious doubt that it was timely. The allegedly improper remarks from the bench—which were in any event of nugatory importance at most—had occurred more than 2 weeks before. The law review article had been published more than a year before. Since the defendants suggested no "good cause . . . for [their] failure to file it" at the commencement of trial, as the statute requires, we have small difficulty concluding that the trial judge acted properly in denying the motion when made in the midst of a lengthy trial.[38]

III. AFFIRMANCE ON THE MERITS OF RULINGS RELATING TO OPTIONAL ZONES, FACULTY INTEGRATION AND PUPIL BUSING

The trial court entered a seven-part decree at the conclusion of its lengthy opinion. Its provisions settle under five headings:

1. *General.*—The defendants were "permanently enjoined from discriminating on the basis of racial or economic status in the operation of the District of Columbia school system;"
2. *Optional zones.*—The defendants were directed to abolish specified optional zones in which pupils could choose which of two schools they wished to attend;
3. *Faculty integration.*—The defendants were directed (*a*) to provide for substantial faculty integration in all District schools immediately, and (*b*) to file with the court a plan for full faculty integration in the future;
4. *Pupil assignment.*—The defendants were directed (*a*) to provide transportation for volunteering pupils from overcrowded schools east of Rock Creek Park to schools with excess capacity west of the park, and (*b*) to submit to the court a long-range plan of pupil assignment to alleviate racial imbalance among District schools; and
5. *Ability grouping.*—The defendants were directed to abolish the "track system." [39]

The general requirement that the Board of Education not discriminate on racial or economic grounds is, of course, no more than declaratory of basic constitutional requirements. The school board's freedom of discretion which the intervenor-appellants seem to protect is therefore not improperly impaired by that part of the order.

As for the optional zones, the trial court found on the basis of a case-by-case evaluation that they had been created in areas where changing residential patterns within the District resulted in white enclaves where normal application of the neighborhood school policy would assign white children to predominantly black schools.[40] These findings are not clearly erroneous, since the trial court's finding that discriminatory intent underlay these zones is supported by the record.[41] The elimination of these optional zones is therefore clearly appropriate remedy for the segregation flowing from these optional zones. The Board of Education has filed a report of compliance, not yet acted upon by the trial court, stating that all optional zones, including some not mentioned in the opinion of the trial judge, have been abolished.

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[37] *But cf.* Tynan v. United States, 126 U.S.App.D.C. 206, 376 F.2d 761, cert. denied, 389 U.S. 845, 88 S.Ct. 95, 19 L. Ed.2d 111 (1967); Simmons v. United States, 302 F.2d 71, 75 (3d Cir. 1962).

[38] *See* Laughlin v. United States, 120 U.S.App.D.C. 93, 99, 344 F.2d 187, 193 (1965).

[39] Hobson v. Hansen, 269 F.Supp. 401, 517–518 (D.D.C.1967).

Those parts of the decree dealing with faculty integration also are premised upon a finding of discriminatory intent. Specifically, the trial court concluded that although black teachers were hired and promoted without bias, "an intent to segregate has played a role in one or more of the stages of teacher assignment." [42] Indeed, the appellants do not challenge the holding that the Board of Education has an affirmative duty to integrate the faculty and administrative personnel of the District schools.[43] Their sole contention is that the "mandatory injunction" requiring compulsory reassignments of present teachers was improper. In so arguing the appellants rely on the belief of Dr. Hansen that such transfers would engender "resentment" among teachers, thereby aggravating the District's already severe problem in attracting qualified teachers, and the recommendation advanced in the task force study of District schools, commonly called the Passow report,[44] that other devices such as recruitment of new teachers and voluntary transfers of existing teachers should be employed.

We do not read the opinion below to contain any such "mandatory injunction." The actual decree requires only substantial teacher integration immediately and a long-range plan for full faculty integration. In discussing the action that will be necessary to achieve integration, the opinion does note that in addition to such steps as color-conscious assignments of incoming teachers, "this court . . . has no doubt that a substantial reassignment of the present teachers, including tenured staff, will be mandatory." [45] Admittedly these words are ambiguous as to whether compulsory reassignments will at some future date be made mandatory by the court or whether the trial court simply believed that the school board in order to comply with the requirement of eventual full integration will be forced to make mandatory reassignments. But since the actual decree speaks only of integration, and in doing so carefully distinguishes between the need for substantial integration immediately and the long-term requirement for full integration, we believe that the ambiguity should be resolved in favor of the latter construction.

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[40] *Id.* at 415–417.

[41] *Id.* at 499–501.

[42] *Id.* at 429.

[43] *See* Bradley v. School Board, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965); Rogers v. Paul, 382 U.S. 198, 86 S.Ct. 358, 15 L.Ed.2d 265 (1965).

[44] Early in 1965, soon after the filing of this suit, the Board of Education commissioned the Teachers College of Columbia University to undertake a comprehensive study of the District schools. The result of this study are reported in a 593-page report entitled Toward Creating a Model Urban School System: A Study of the Washington, D.C. Public Schools (September 1967). The volume is popularly known as the *Passow Report* after the study director, Dr. A. Harry Passow.

[45] 269 F.Supp. at 516.

That being so, the words of the opinion reduce to a mere prediction which may be proved incorrect by the success of other tactics in achieving integration. We note that the school board has filed reports detailing the present progress toward faculty integration and its long-term plans to achieve integration. The long-term plan does not include mandatory reassignments, and has not been acted upon by the trial court. The school board has in that report outlined the difficulties of redically shuffling present teachers about the District. In evaluating its arguments, we are confident that the trial judge will assign due weight to the proper considerations of teacher qualifications and the reluctance of teachers residing close to their present schools to travel long distances to a new assignment. Thus we do not construe the decree to preclude consideration of the plight, referred to in the Passow report, of teachers who have previously performed at a satisfactory level in the school system but who do not have requisite ability and background for teaching disadvantaged students.[46] At the same time, regardless of the opinions of Dr. Hansen and the authors of the Passow report, we point out the obvious: Racial prejudices on the part of teachers, who are employees of the government, is not a valid justification for continued segregation.

In its most recent term the Supreme Court has made clear that at this late date the remedy for segregatory practices must be prompt. "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now." [47] This does not preclude a proper regard for the administrative difficulties of transition to a new day. It does preclude procrastination rooted in racial feelings.

The trial court also ordered the Board of Education to provide transportation for children in overcrowded schools east of Rock Creek Park to schools with excess capacity west of the park and directed the board to file a long-term plan for pupil assignment "complying with the principles announced in the court's opinion." [48] In doing so the court specifically did not attack the neighborhood school policy in view of its wide use throughout the country and the absence of "segregatory design" in its application in Washington.[49] The trial judge did, however, find a notable inequality of resources and facilities between predominantly black schools and those with a greater admixture of whites.[50] The court also examined in detail the repeated findings by the Supreme Court and others that racially segregated schools harm the black child.[51]

While suggesting that the continuing vestiges of unconstitutional faculty segregation might support the requirement of short-term pupil busing,[52] the trial court premised this part of its order on the finding that the school board had not shown that the cost of providing such transportation justified the denial of equal educational opportunity resulting from overcrowded and predominantly black schools.[53] Since Dr. Hansen testified in favor of busing at the pupil's expense to relieve overcrowding, the appellants travel a fine line in arguing that the mere requirement for payment of transportation costs by the school board improperly restrains its freedom of discretion. Indeed, the appellants may well have conceded away their argument in agreeing that overcrowded conditions in some schools cannot justify the failure of the Board of Education to provide kindergartens for all students if it provides them for any.[54]

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[46] *Passow Report* at 7. Likewise we intimate no opinion on the suggestion of the *Passow Report* for programs to recruit white teachers for black schools to achieve better racial balance in school faculties notwithstanding the possibility that such recruitment programs may open the door to accusations that white applicants are being favored over Negroes.

[47] Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

[48] 269 F.Supp. at 517.

[49] *Id.* at 515, 519.

[50] *Id.* at 436–438.

[51] *Id.* at 419–421, 503–506.

Opinions may differ as to the source and magnitude of differences between the educational opportunities offered by various District schools. But when the differentiating factor is as clear as overcrowding versus excess capacity, we agree with the trial court that transportation to level out pupil density can farily be required of the school board.

IV—Determination That District Court's Rulings in Long-Range Pupil Assignment and Track System Do Not Limit School Board's Discretion To Pursue Educational Goals and Provide Ability Grouping and That Accordingly Parents Lack Standing To Challenge Underlying Factual and Legal Bases of These Provisions of the Decree

We conclude that the long-range plan of pupil assignment required by the order of the trial court does not trammel the discretion of the school board. The opinion does direct the board to consider such alternatives as educational parks and the Princeton plan.[55] But in the absence of a more specific order this part of the directive is merely precatory. The demonstrated inequalities among Washington schools justifies an order requiring the school board to consider alternative policies; we cannot believe that the freedom of action the intervenor-appellants seek to protect for the Board of Education need include the freedom to stand pat without engaging in further reevaluation of assignment policies.

The opinion of the trial court also states:

> Where because of the density of residential segregation or for other reasons children in certain areas, particularly the slums, are denied the benefits of an integrated education, the court will require that the plan include compensatory education sufficient at least to overcome the detriment of segregation and thus provide, as nearly as possible, equal educational opportunity to all schoolchildren.[56]

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[52] *Id.* at 502–503.

[53] *Id.* at 510–511.

[54] One consequence of overcrowding in the schools east of Rock Creek Park was the inability of some of these schools to provide kindergartens for every youngster. *See id.* at 438–439.

[55] *Id.* at 503–511, 515.

[56] *Id.* at 515.

Even aside from the feelings of inferiority engendered by black schools, there is no doubt that education in a ghetto school can fatally limit a child's horizons and fail to prepare him for constructive participation in society. Residential patterns and the heavy concentration of black children in the District public schools may defy the best efforts of the Board of Education to achieve racially balanced schools while these factors persist.[57] The long run solution may lie in a more broadly based school district extending beyond the borders of the District. But such a development is beyond the pale of judicial action. Appellants could have no cause to object to any efforts of the Board of Education to enlist the voluntary cooperation of other school districts. Similarly we cannot see that appellants would have cause, while we still have black schools within the District, or for that matter at any time, to complain about the making of special efforts to prepare disadvantaged students to find their place in a wider world. And we see no realistic basis for saying that the references by the district court to the need for such efforts operates in fact to curtail the school board's discretion.

What appellants seek is assurance that a neighborhood school approach may be maintained by the Board. The decree permits retention of the neighborhood school approach where it does not result in relative overcrowding or other inequality of facilities.

Any other comments in the opinion that may be taken as favoring abandonment of the neighborhood school approach have standing only as suggestions advanced for consideration by the Board. The Board has also received suggestions, in the Passow report, for decentralization of the school program into subsystems, with eight community superintendents, and "that the schools be transformed into community schools, collecting and offering the variety of services and opportunities its neighborhood needs." We are not to be taken as approving or disapproving either of these general philosophies. On this appeal this Court is concerned only with the provisions of the decree containing orders that something be done or stopped—and it is our view that these provisions do not improperly encroach on the Board's statutory discretion.

The last provision of the decree below to be considered is the order that the "track system" be abolished. Behind that curt directive lies a welter of facts and conflicting opinions. In theory, the "track system" like any procedure for ability grouping sought to classify students according to their "ability," whether present or potential, and to provide the education best suited to the needs of each individual child. And since any such system is inevitably fallible, the procedure must make adequate provision for review and reassignments. Unfortunately, as the Passow report concluded, "[T]he tracking system was as often observed in the breach as it was in the adherence to any set of basic tenets."[58] The trial court concluded that the excessively rigid separation of students in different classrooms made each track a largely self-contained world; that the education provided in the lower tracks was so watered down as to be more fairly described as warehousing than as remedial education; that an excessive reliance upon intelligence tests standardized to white middle-classed norms made initial classifications erratic and irrational in terms of the professed goals of the system; and that the schools slighted their duty to encourage students to "crosstrack" in individual course selections and to review track assignments in order to make reassignments where initial error or later developments made this appropriate.[59]

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[57] At the time of the decision below 90 per cent of the students in District public schools were black. *Id.* at 410. Since then the proportion has increased to 92 per cent. Report of Pupil Membership in Regular Day Schools on October 19, 1967, Office of the Statistical Analyst.

[58] *Passow Report* at 17.

The appellants challenge these findings as well as their constitutional significance if valid. And indeed it would be little less than amazing if such an extended analysis of this complex problem produced a limpid pool of unassailable facts. In some cases, as the words of the Passow Report suggest, the difficulty lies in the gulf that may separate theory and practice. Thus, the trial court accepted the "general proposition that tests are but one factor in programing students," [60] but went on to conclude that this single factor played a disproportionate role. A keystone of this analysis was the reasoning that while teachers play a major part in the assignment decision, their evaluations of the student will be markedly influenced by his reported test scores. This conviction is certainly shared by many, but, resting as it does in part on beliefs concerning human nature and the pressures of time which beset teachers like judges, the proposition cannot be demonstrated beyond cavil.

Another difficulty lurking in the factfinding process is the absence of an accepted yardstick to measure the performance of an ability-grouping system. In some cases statistics are ineluctably ambiguous in their import—the fact that only a small percentage of pupils are reassigned may indicate either general adequacy of initial assignments or inadequacy of review. Superintendent Hansen himself appreciated the importance of care in initial assignments and timely reevaluation. When funds became available the school administration improved the track system by providing for the study by a clinical psychologist, referred to by the district court, of 1,272 students assigned or about to be assigned to the "special academic" or "basic" track. This study revealed almost two-thirds to have been improperly classified.[61] The track system was duly changed so as to require that a psychologist participate prior to assignment of any child to the "basic" track. The track system, in short, was not static or frozen, but rather a program in flux, which underscores the reality that discontinuance of this system as it happened to exist at a moment in time was not coercive or inhibiting of the school board's discretion in the way feared by the appellants.

The Passow Report also made an exhaustive analysis of the operation of the "track system" and like the trial court criticized many aspects of it.[62] This Court would face a difficult task were it necessary to stack each finding of the trial court against the comparable findings of the Passow Report. Indeed it may be that the district court would have made different findings—though possibly it would have entered the same judgment—if the Passow Report had been published and made part of the record prior to the issuance of the findings instead of being added to the file and record by a supplementary order.

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[59] 269 F.Supp. at 442–492.

[60] *Id.* at 475.

[61] These statistics, of course, show only that classifications made without psychological testing were inaccurate when re-evaluated on the basis of test results. They do not reveal whether the initial classifications, or prior re-evaluations, were inaccurate from the vantage point of the information then available.

[62] *Passow Report* at 193–241.

The decision of this case does not call on us to undertake any formidable survey or analysis. There are, indeed, a number of contentions we do not find it necessary to consider, and we think it appropriate to state so clearly, in order to obviate avoidable misunderstanding of the scope and purport of our ruling in this sensitive area. We do not find it necessary to resolve appellants' broad legal contentions.[63] Nor do we find it necessary to rule on appellants' intermediate legal contentions.[64] Certainly we do not find it necessary to plunge into a sea of factual contentions and difficult issues of educational policy, such as:

> *a.* Considering the proper balance, in tailoring educational programs to the ability of the individual student, between the practical need to group children by measurement of presently demonstrated ability and the simultaneous need to assure all students an opportunity to realize their educational potential;
>
> *b.* Considering to what extent verbal tests may be utilized, either as valid predictors of school success, or as indicators of the gaps in skills that must be filled if minority children are to emerge from poverty backgrounds and become effective participants in contemporary American life; and
>
> *c.* Considering to what extent verbal tests must be adjusted or supplemented in the light of available indicators of educational ability not dependent on existing verbal skills.

The intervenors come before this court only to protect the freedom of the Board of Education to exercise the widest discretion in setting educational policies within the District. The order under challenge directs only that the "track system" be abolished. Moreover, in doing so, the trial court specifically "assumed . . . [ability] grouping can be reasonably related to the purposes of public education."[65] In compliance with the decree the "track system" as such has been abolished for more than a year. Both the opinion below and the Passow Report indicate that changes were continually being made in the process of ability grouping in District schools before the decision below was delivered.[66] In light particularly of the detailed recommendations made in the Passow Report for change in procedures for ability grouping, we have little if any basis for assuming that the scope of the Board's reevaluation would be materially affected by the judicial directive to abolish the "track system." We cannot believe, for example, that appellants would gainsay the simple proposition that a board whose attention was called to problems of the track system—whether by observations of the trial judge, quite apart from any decree, or by the Passow Report, or by other sources—could hardly be expected to sit by without making substantial efforts to upgrade the performance of those children whose present verbal skills were low but who had the innate capacity to respond to substantial efforts.

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[63] Appellants insist that there was no discrimination on account of race, but only differences in track assignment ascribable to the socio-economic and cultural background of the children which appeared even within groups of all black children, whose track assignments paralleled their backgrounds. Appellants also attack the general applicability of the preferred rights doctrine to such issues, and alternatively deny its application in a case where the school administration was making efforts to improve the system.

[64] For example, appellants claim that there is nothing in the record to support any criterion, implicit in the District Court's conclusion, from which to conclude that the extent of the "cross-tracking" and inter-track transfers that had in fact developed were not sufficient to establish requisite flexibility. Appellants also submit that even the question of delineating appropriate flexibility is a question for the school board.

[65] 269 F.Supp. at 512.

[66] *See, e.g., id.* at 475 & n. 118, 490–491; *Passow Report* at 193.

The ruling of the district court permitting intervention to appellant-parents was prescient, especially in view of the spirit of the Supreme Court's ruling of *Flast* v. *Cohen*.[67] The case is unique, there is a clear controversy, and illumination of the issues is in the public interest. The spirit of *Flast* v. *Cohen* likewise enjoins us to confine the issues considered on the merits upon this intervention to those issues that have a realistic nexus to the interests and concerns of the appellants as parents of school children, white and black. This Court's ruling is consistent with and not in derogation of the realistic and understandable concerns of the parents that there be adequate scope for ability groupings in the administration of the school system. The district court made it clear, and in any event this Court's opinion makes it clear, that the decree permits full scope for such ability grouping.

This Court's disposition is not to be taken as in any way indicating indifference to the expressed concern of appellants that the School Board be able to exercise discretion in pursuing the goals of both quality and equality in educational opportunity without restraint attributable to an assertedly unlawful decree. The district court's decree must be taken to refer to the "track system" as it existed at the time of the decree. It merits reiteration, and it is perfectly clear from the record, that neither the School Board nor Superintendent Hansen were satified with the track system as it was or desired a freeze in its features. They were aware of the need for changes, and sought necessary funds. Of paramount importance is the fact that the school administration allocated substantial funds for commissioning the Passow Report. The significance of that report as a likely prime mover energizing other changes was apparent from the start and can hardly be controverted.

Therefore, the provision of the decree below directing abolition of the track system will not be modified. We conclude that this directive does not limit the discretion of the School Board with full recognition of the need to permit the School Board latitude in fashioning and effectuating the remedies for the ills of the District school system. This need for according scope and flexibility is heightened by the circumstance that in 1968 the District of Columbia had its first opportunity to elect a school board. This is an area in which Congress has entrusted to the Board of Education—now an elected board—"the control of the public schools of the District of Columbia." [68] and provided that this board "shall dtermine all questions of general policy relating to the schools." [69] As we have already noted appellants cannot realistically deny that the elected Board will wish to address itself to all deficiencies in public education, and to take into account all pertinent analyses, whether in the comments of legislative staffs, the district court's opinion, the Passow Report, perhaps future studies, etc. The problems are complex, and the Board's exploration will undoubtedly be extensive. The exploration must be conducted consistently with constitutional requirements, and these in turn are dependent on manageable standards. The simple decree enjoining the "track system" does not interpose any realistic barrier to flexible school administration by a school board genuinely committed to attainment of more quality and equality of educational opportunity. If the district court should impose an undue restraint on the School Board's efforts to improve quality and equality of educational opportunity, such action would, of course, be subject to expeditious correction by this Court.

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[67] 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

[68] 31 D.C.Code § 101(a) (1967).

[69] 31 D.C.Code § 103 (1967).

As construed by this opinion, the order entered by the trial court does not require modification to meet any of the challenges that intervenors have standing to raise. However, in view of the change in composition of the School Board following from the recent election, it seems appropriate at this juncture to enter an order of remand, rather than a simple affirmance, to make doubly clear that the plans heretofore filed in this cause by the prior Board do not foreclose the new Board from evolving new programs and orders pertaining to administration of the schools.

So ordered.

McGowan, Circuit Judge:

Congress has explicitly vested in the Board of Education the "control of the public schools of the District of Columbia," and has directed that that body "shall determine all questions of general policy relating to the schools." 31 D.C. Code 101, 103 (1967). Among such "questions of general policy" was surely the one of whether the Board would appeal the decision of the district court in this case. In a climate of change and re-examination created by the Board's own initiative in commissioning the so-called Passow Report, the Board addressed itself to the major issues of policy underlying the question of whether to appeal. Those issues obviously comprehended much more than the mere legal soundness of the district court's decision. The Board decided by a vote of 6 to 2 not to appeal. The action, in my view, ended this litigation for appellate purposes, except for such appeals as the Board may elect to take in the future from any further orders of the district court.

My colleagues agree with me to appellants Hansen and Smuck. Some of them—enough to constitute with me a majority—have also concluded that the appellant parents are not properly before us with respect to certain portions of the decree. They reach that conclusion by a more tortuous path than I find it necessary to take, but, in respect of intervention, we reach the same result to this limited degree, namely, that there is no one before us withstanding to challenge those provisions of the decree which:

> 1. Generally enjoin the board from racial or economic discrimination;
>
> 2. Require the submission of a pupil assignment plan for the Court's approval; and
>
> 3. Enjoin the operation of the track system.

This result necessarily means that the appeals with respect to these provisions of the decree are dismissed without resolution of their legal merit.

I would do the same with the decree in its entirety. The appellant parents sought to intervene in this litigation only after the board had decided not to appeal. Their intervention pleadings state as their only reason for seeking this belated entry into the case that they "dissent from" the board's decision. There are no allegations of any kind that the board majority was faithless to its trust, or acted corruptly, conspiratorially, or from any improper motivation whatsoever. Their position essentially is that, had they been on the board, they would have voted differently. I cannot believe that it is either good law or sound policy to permit intervention under these circumstances solely to enable dissident citizens to prolong a lawsuit against the board which the board, in the exercise of its statutory responsibility for the welfare of the schools, has thought it advisable to terminate.

Rule 24(a)(2) (Fed.R.Civ.P.), says that there is to be no intervention if "the applicant's interest is adequately represented by existing parties." The only inadequacy of representation asserted by appellant parents is a policy disagreement with the board over its decision not to appeal. This policy issue, however, is committed by Congress to the board, and it is anomalous in the extreme to think that Congress, in accepting the Federal rules, contemplated that any district resident who did not like the board's decision to end a lawsuit could second-guess that decision by claiming a right to intervene.

I think the granting of intervention here for any purpose is an unacceptably loose construction of the Federal rules which, I hope, will not endanger rational principles of judicial administration in other, and less emotional, areas of litigation. Permitting it here is also far from a promising omen for the capacity of the new and, for the first time, popularly elected board to keep firmly within its own grasp all important strands of educational policy.

I have from the beginning not thought it necessary to do other with these appeals than to dismiss them.[1] Not one of my colleagues has been prepared to embrace this position completely. We are left, then, with the need to dispose of this appeal in some reasonably definitive manner and thereby to foster the desirable objective of moving this litigation along toward its eventual termination. To this end, and for this purpose, I am willing to deal with the merits of those particular provisions of the decree as to which my colleagues are all in agreement that at least some of the appellants have standing. These are:

1. The requirement of transportation for students at overcrowded schools who wish to go to underutilized schools;
2. The abolition of optional zones; and
3. The requirements with respect to teacher integration.

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[1] The case authorities do not seem to me to be conclusive on the issue of intervention. This appears quite clearly from the careful review made of them by the District Court in its extended treatment of the issue in its opinion on the motion for intervention, granted solely for the purpose of enabling appellants to be heard on the question here, 44 F.R.D. 18 (1968). There is no point in pursuing that examination further, except to take note of the only case cited by Judge Bazelon which has been decided since the District Court's opinion. Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942 (1968), is a significant enlargement of the right of a citizen to bring a suit challenging a federal expenditure. It has nothing to do with the intervention issue presented by this record, except as it is expansively read as meaning that, in any litigation of public interest, anyone can get in at any time. I do not read it that way, nor would, I suspect, the District Court regard its reluctant decision to grant intervention as "prescient" of such a reading.

These provisions of the decree seem to me consistent with established and authoritative legal doctrines. *Rogers* v. *Paul* (382 U.S. 198, 86 S.Ct. 358 (1965)); *Bradley* v. *School Board* (382 U.S. 103, 86 S.Ct. 224 (1965)); *Brown* v. *Board of Education* (347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)); *Sweatt* v. *Painter* (339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950)).

I vote to affirm the judgment of the district court in those respects, and also with reference to the issues dealt with in part II of Judge BAZELON's opinion; and to this end I join in parts II and III of that opinion. Although, as indicated above, I would have found no standing at all, since I am alone in that point of view and concur in the result reached in part IV, I also join in that part.

Danaher, Circuit Judge, with whom Circuit Judges Burger and Tamm join, *dissenting:*

When Congress adopted the District of Columbia Elected Board of Education Act,[1] it announced "Findings and Declaration of Purpose," as follows:

> The Congress hereby finds and declares that the school is a focal point of neighborhood and community activity; that the merit of its schools and educational system is a primary index to the merit of the community; and that the education of their children is a municipal matter of primary and personal concern to the citizens of a community. It is therefore the purpose of this act to give the citizens of the Nation's Capital a direct voice in the development and conduct of the public educational system of the District of Columbia; to provide organizational arrangements whereby educational programs may be improved and coordinated with other municipal programs; and to make District schools centers of neighborhood and community life.

Additionally, the act was made to read explicitly in pertinent part:

> The control of the public schools of the District of Columbia is vested in a Board of Education to consist of 11 elected members. . . . [Emphasis mine.]

The term of office of an elected member of the new Board is to begin at noon on the fourth Monday in January 1969, and meetings of the Board are to be open[2] to the public. Specifically, Congress made it proof positive that:

> . . . no final policy decision . . . may be made by the Board of Education in a meeting . . . closed to the public.

It is obvious from the legislative hearings that Congress was quite aware, as assuredly the general public in the District of Columbia well knows, that complex questions has arisen in the administration of the schools in the District. The general awareness became specific following the trial[3] which commenced July 18, 1966, and continued off and on until October 25, 1966. Circuit Judge Wright on June 19, 1967.

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[1] P.L. 90–292, 82 Stat. 101, approved Apr. 22, 1968.

[2] With certain exceptions not here pertinent.

[3] Some 39 witnesses had testified, and more than 450 exhibits had been introduced.

as trial judge rendered his opinion [4] which incorporated his findings of fact, conclusions of law and a decree.[5]

It seems to me clear that Congress was intent upon the creation of an entirely new entity to which has been delegated the "control" of the public schools of the District of Columbia in furtherance of what might be discerned as the "direct voice" of our District citizens. The situation here is cearly unique and, likely enough, finds no counterpart throughout the Nation. There has been widespread dissatisfaction with the administration of our schools through a Board appointed by the District judges. We ourselves had taken note of the problems and had recognized that we had been confronted with "a very sensitive political question." [6] That discrimination in various forms had been continued for many years or had arisen since May 19, 1954,[7] was abundantly established by Judge Wright's findings in *Hobson* v. *Hansen*.[8] The details thus became apparent and the extent of the complexities of the problems confronting the schools in the Nation's Capital cannot be doubted. Accentuation of the realities is to be found in what Judge Bazelon has written. All the more on that account I find myself impressed by Judge Wright's "parting word" where as he concludes his opinion he says:

> It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government.[9]

I agree. It is precisely at this point that I feel the interposition of the judiciary should cease. The evils of de jure segregation have been exposed. The factors which have led some to conclude that de facto segregation has existed have been laid bare. I think—right here—is the place at which we should exercise judicial restraint. Declaratory and injunctive relief had been sought, and Judge Wright had entered his decree. I think that decree should be vacated.

It is fundamental that in circumstances such as here have been disclosed the courts are not bound to grant the relief as prayed. Dr. Hansen as superintendent of schools had announced his retirement effective as of July 31, 1967. The "old" Board of Education presently will have been supplanted by the Board so recently elected by our citizens. Many of the practices exposed at trial have already been ameliorated, and yet others may prove impossible of resolution unless the Congress shall become persuaded that funds must be provided. In other aspects, difficulties must be overcome in terms of practicalities which cannot be ignored. Transportation problems, new schools, pupil assignments, teacher integration, and yet other phases of the situation disclosed in

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[4] *Hobson* v. *Hansen*, 269 F.Supp. 401–517.

[5] The terms of the decree are set forth in 269 F.Supp. at 517–518.

[6] We so observed in the resolution adopted by the Judicial Conference in Executive Session on May 26, 1967, and we asked Congress to lodge the appointive power of members of the Board "elsewhere." See our resolution appearing in Appendix I.

[7] The Supreme Court then had decided *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 *and see Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954).

[8] *Supra* note 4.

[9] 269 F.Supp. at 517.

Hobson v. *Hansen*[10] must be met in accordance with the policy to be formulated by the elected Board acting in furtherance of the purposes of the act, supra.[11]

Undoubtedly in the day and time of it, the issuance of the decree seemed essential in light of *Brown* v. *Board of Education*.[12] But now that Congress has spokn and the electorate has acted, a very different status has evolved. Putting aside any effort to achieve in advance of action by the newly elected Board, a definition of judicially manageable standards to bind its execution of the policy entrusted to it, it is enough to say that wrongs have been exposed. The members of that Board have sought election thoroughly acquainted with the myriad problems for which solutions must be sought. It is a matter of judgment on our part, to be sure, but we can not be oblivious to the fact that political considerations and the necessity for compromise and readjustment will have weight as the new Board enters upon its duties.

Merely by way of analogy, we may refer to the concluding observation by Mr. Justice Frankfurter in *Colegrove* v. *Green*: [13]

> The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.

In short, it is entirely apropos that the court should not enter the stormy[14] thicket. With Mr. Justice Rutledge in *Colegrove*,[15] I think this court now should decline further to exercise its jurisdiction, and the cause should be remanded to the district court with directions to vacate the decree.[16]

APPENDIX I

JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA CIRCUIT

Resolution by the judges of the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia, in executive sessions of the Judicial Conference for the Circuit, 1967.

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[10] *Supra* note 4.

[11] Moreover, § 5 of the Act, *supra* note 1, pertinently provides that the Board of Education and the Commissioner of the District of Columbia shall jointly develop procedures to assure the maximum coordination of educational and other municipal programs and services in achieving the most effective educational system and utilization of educational facilities and services to serve broad community needs.

[12] 349 U.S. 294, 300–301, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). But upon whom has the responsibility devolved for compliance with the terms of the decree? The resigned Hansen? The supplanted Board?

[13] 328 U.S. 549, 556, 66 S.Ct. 1198, 1201, 90 L.Ed. 1432 (1946).

[14] See news article, Washington Post, Dec. 5, 1968, attached as Appendix II.

[15] *Supra* note 13, 328 U.S. at 566, 66 S.Ct. 1198; *and see Baker* v. *Carr*, 369 U.S. 186, 233, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

[16] *Cf. Mills* v. *Green*, 159 U.S. 651, 653–654, 16 S.Ct. 132, 40 L.Ed. 293 (1895); *Chicago Great Western Ry. Co.* v. *Beecher*, 150 F.2d 394, 398 (8 Cir. 1945), cert. denied, 326 U.S. 781, 66 S.Ct. 339, 90 L.Ed. 473 (1946).

RESOLUTION

Whereas, under the District of Columbia Code (1961), title 31, section 101, the judges of the U.S. District Court for the District of Columbia are charged with the duty of appointing the members of the Board of Education of the District of Columbia, and

Whereas, this duty has rested with the judges of the U.S. District Court for the District of Columbia since June 20, 1906, and

Whereas, in recent years the appointment of members of the Board of Education has become an extremely controversial question among the citizens of the District of Columbia, and

Whereas, the matter of appointing members of the Board of Education is now a very sensitive political question, not in the party sense, but in a broader sense, and

Whereas, the judges of the U.S. District Court for the District of Columbia feel that they should not be required to act in this political field, and

Whereas, the judges of the U.S. District Court for the District of Columbia feel that in view of the foregoing, the appointive power of members of the Board of Education should not be in the judges of the U.S. District Court for the District of Columbia; now, therefore, be it.

Resolved, that the Congress of the United States be requested to amend the District of Columbia Code (1961) Title 31, Section 101, to remove the appointive power of members of the Board of Education from the judges of the U.S. District Court for the District of Columbia and to lodge said power elsewhere.

ADOPTED: MAY 26, 1967.

A true copy:

Teste:
/s/ Nathan J. Paulson
Secretary of the Judicial Conference
of the District of Columbia Circuit

APPENDIX II

[The Washington Post, December 5, 1968]

HOBSON TO BYPASS MAYOR AND COUNCIL

Julius Hobson, militant school board member-elect, said last night that he plans to deal directly with Congress on requests for District school funds and will bypass the mayor and city council when he takes office in January.

"I got 61,000 votes, the mayor got one, from President Johnson." Hobson told a group of about 35 at a meeting in the Church of the Redeemer, 14th and Girard Streets NE.

Hobson said that he had called upon education experts across the country to give him advice for the new job. He has asked a Harvard research group to conduct a cost analysis study of the school budget and to develop proposals for changes in the curriculum, he said.

As a first order of business, he said, he intended to see that the Wright decision was carried out to the letter of the law.

(Hobson was the plaintiff in the Wright decision, handed down in June 1967, which abolished the track system of ability groupings in District of Columbia schools.)

Hobson said he had asked the New Jersey Council on Constitutional Law to give him a full legal interpretation of the powers of the school board under the Wright decision, and also how it affects teachers.

Schools Superintendent William R. Manning and all present members of the school administration will be given a fair chance, Hobson said, but he indicated that he probably will call for the dismissal of at least two men: John D. Koontz, an assistant superintendent, and Granville Woodson, director of buildings and grounds.

Koontz admitted that he drew school boundary lines to separate blacks from whites in his testimony in the case that led to the Wright decision, Hobson said.

"Men like Koontz have to go," Hobson said.

Hobson said Woodson had a record for not following school board directives.

Hobson hurled frequent criticisms at Anita Allen, incumbent school board member and his chief contender for chairman of the new board.

"I understand she is railroading stuff through. The new board will have a lot to clean up," he said.

The five new members who were endorsed by the Triple E committee and Muriel Alexander, who got Hobson's personal endorsement, add up to a "working majority on paper" on the new board, he explained. "If these people stick to it, we can change the board of education," he said. But, he said, he also was prepared to work without an alliance.

BURGER, Circuit Judge (with whom Circuit Judge TAMM joins):

We join in Judge Danaher's opinion and his view that sound principles of judicial restraint command that the mandate be vacated assuming, *arguendo*, that a subject so complex and elusive, and so far beyond the competence of judges, would have warranted judicial action in the first instance.

We add a brief comment to underscore what we believe is implicit in the principal opinion, and indeed in Judge Danaher's dissent. The holding of the district court is not affirmed as written but only as construed by four members of this court. Even a cursory reading of the principal opinion reveals that as so construed, the mandate under review is essentially advisory to the former school board which has ceased to exist. As we see it the new school board is at liberty to make such use of it as it desires in much the same way as it may derive useful guidance from the Passow report.

Several commentators have expressed views which undergrid what Judge Danaher has said as to the need for caution and restraint by judges when they are asked to enter areas so far beyond judicial competence as the subject of how to run a public school system. We have little difficulty taking judicial notice of the reality that most if not all of the problems dealt with in the district court findings and opinion are, and have long been, much debated among school administrators and educators. There is little agreement on these matters, and events often lead experts to conclude that views once held have lost their validity. The commentary from various sources, including law reviews, tends to supply strong support for Judge Danaher's very sound view on the need for judicial restraint. The Harvard Law Review comments:

> . . . [T]he limits upon what the judiciary can accomplish in an active role are an additional reason for circumspection, particularly in an area where the courts can offer no easy solutions.
>
> . . . A court applying the *Hobson* doctrine must necessarily resolve disputed issues of educational policy by determining whether integration by race or class is more desirable; whether compensatory programs should have priority over integration; whether equalization of physical facilities is an efficient means of allocating available resources for the purpose of achieving overall equal opportunity. There is a serious danger that judicial prestige will be committed to ineffective solutions, and that expectations raised by *Hobson*-like decisions will be disappointed. Furthermore, judicial intervention risks lending unnecessary rigidity to treatment of the social problems involved by foreclosing a more flexible, experimental approach.
>
> The *Hobson* doctrine can be criticized for its unclear basis in precedent, its potentially enormous scope, and its imposition of responsibilities which may strain the resources and endanger the prestige of the judiciary. . . .

Hobson v. *Hansen;* Judicial Supervision of the Color-Blind School Board, 81 Harv. L. Rev. 1511, 1527, 1525 (1968) (footnote omitted).

The Stanford University Law Review had these comments:

> It seems to have been the very magnitude of these problems that led the [district] court to search for remedies. In a brief paragraph entitled "Parting Word" the court, anticipating the adverse reaction its substantially unprecedented intervention has indeed provoked, set forth its apologia in these terms:
>
>> It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance.
>
> . . . If at this time, however, such problems seem to "defy" social and political resolution, they are not for that reason more open to resolution by the courts. The responsibility lies first with those whose area of expertise comprehends feasible solutions.

Hobson v. *Hansen*: The De Facto Limits on Judicial Power, 20 Stan. L. Rev. 1249, 1267 (1968) (footnotes omitted).

After enumerating a number of objections to the constitutional underpinnings of a *Hobson* v. *Hansen*-type opinion, Professor Kurland of the University of Chicago goes on to state:

> And my third point of difficulty with the suggested constitutional doctrine of equality of educational opportunity is that the Supreme Court is the wrong forum for providing a solution. . . .
>
> When we turn to the school desegregation cases, the problem most closely analogous to the one we are considering here, we find a more dismal picture of what must be acknowledged to be the Supreme Court's failure rather than its success. The New York Times in its annual educational survey for 1968, 13½ years after *Brown* v. *Board of Education*, suggests that we are hardly any further along the line toward school desegregation than we were in 1954.
>
> The Washington, D.C., example is too much with us. And everything that Judge Skelly Wright can do will not afford an integrated school system for the Nation's Capital. All that he can accomplish is to assure that the brighter students receive no better education within the system than the other students.
>
> As I have suggested, it is perhaps because of the fact that local governmental units, especially those located in metropolitan areas, cannot or will not bring about racial desegregation that some are looking to the equal educational opportunity concept to break down the municipal boundaries in order to include suburban areas under the same umbrella as that which covers the slum schools. Absent a reversal of the Court's decision in *Pierce* v. *Society of Sisters*, however, the escape route of private education will not be closed. And a reversal of that decision will arouse the opposition not only of the suburbanites but of organized religions as well.
>
> Kurland, Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined, 35 U. Chi. L. Rev. 583, 592, 594, 595 (1968) (footnotes omitted).

This court—and courts generally—would do well to heed these sobering observations.

Part VI

EQUAL OPPORTUNITY IN HOUSING CASES

HUNTER *v.* ERICKSON

303 U.S. 385 (1969)

ON APPEAL FROM THE SUPREME COURT OF OHIO

REVERSED

JANUARY 20, 1969

Mr. Justice WHITE delivered the opinion of the Court.

The question in this case is whether the city of Akron, Ohio, has denied its Negro citizen, Nellie Hunter, the equal protection of its laws by amending the city charter to prevent the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the voters of Akron.

The Akron City Council in 1964 enacted a fair housing ordinance premised on a recognition of the social and economic losses to society which flow from substandard, ghetto housing and its tendency to breed discrimination and segregation contrary to the policy of the city to "assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin." Akron Ordinance No. 873–1964 section 1. A commission on equal opportunity in housing was established by the ordinance in the office of the mayor to enforce the antidiscrimination sections of the ordinance through conciliation or persuasion if possible, but if not then "through such order as the facts warrant," based upon a hearing at which witnesses may be subpenaed, and entitled to enforcement in the courts. Akron Ordinance No. 873–1964, as amended by Akron Ordinance No. 926–1964.

Seeking to invoke this machinery which had been established by the city for her benefit, Nellie Hunter addressed a complaint to the commission asserting that a real estate agent had come to show her a list of houses for sale, but that on meeting Miss Hunter the agent "stated that she could not show me any of the houses on the list she had prepared for me because all of the owners had specified they did not wish their house shown to Negroes." Miss Hunter's affidavit met with the reply that the fair housing ordinance was unavailable to her because the city charter had been amended to provide:

> Any ordinance enacted by the council of the city of Akron which regulates the use, sale, advertisements, transfer, listing

> assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein. Akron City Charter section 137.

The proposal for the charter amendment had been placed on the ballot at a general election upon petition of more than 10 percent of Akron's voters, and the amendment had been duly passed by a majority.

Petitioner then brought an action in the Ohio courts on behalf of the municipality, herself, and all others similarly situated, to obtain a writ of mandamus requiring the mayor to convene the commission and to require the commission and the director of law to enforce the fair housing ordinance and process her complaint. The trial court initially held the enforcement provisions of the fair housing ordinance invalid under State law, but the Supreme Court of Ohio reversed, *State ex rel. Hunter* v. *Erickson* (6 Ohio St. 2d 130, 216 N. E. 2d 371 (1966)). On remand, the trial court held that the fair housing ordinance was rendered ineffective by the charter amendment, and the Supreme Court of Ohio affirmed, holding that the charter amendment was not repugnant to the equal protection clause of the Constitution.

Akron contends that this case has been rendered moot by the passage of the Civil Rights Act of 1968, Public Law 90–284, 82 Stat. 73, the decision of this Court in *Jones* v. *Alfred H. Mayer Co.* (392 U.S. 409 (1968)), and the passage of an Ohio Act of October 30, 1965 (Ohio Rev. Code, tit. 41, c. 4112). It is true that each of these events is related to open housing, but none of the legislation involved was intended to pre-empt local housing ordinances or provide rights and remedies which are effective substitutes for the Akron law.

The 1968 Civil Rights Act specifically preserves and defers to local fair housing laws,[1] and the 1866 Civil Rights Act[2] considered in *Jones* should be read together with the later statute on the same subject, *United States* v. *Stewart* (311 U.S. 60, 64–65 (1940)); *Talbot* v. *Seeman* (1 Cranch 1, 34–35 (1801)), so as not to preempt the local legislation which the far more detailed act of 1968 so explicitly preserves. If the Ohio statute mooted the case, surely the Ohio Supreme Court would have so held when the validity of the Akron ordinance was twice before it after the Ohio statute was passed. Moreover, the sections of the Ohio law which are crucial here apply only to "commercial housing," and on any reading we can imagine do not apply to Miss Hunter's case,[3] though the Akron ordinance does. Finally, the case cannot be considered moot since the Akron ordinance provides an enforcement mechanism unmatched by either State or Federal legislation. Unlike State or Federal programs, the Akron ordinance brings local people together for conciliation and persausion by and before a local tribunal. It is to precisely this sort of very localized solution to which Congress meant to defer. We therefore reject the contention that this case is moot.

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[1] Nothing in the federal statute is to be construed "to invalidate or limit any law of a State or political subdivision of a State" giving similar housing rights, and deference is to be given to local enforcement. Civil Rights Act of 1968, Tit. VIII, §§ 815, 810(c), 82 Stat. 73, 89, 96.

[2] "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. C. 31 § 1, 14 Stat. 27, as amended, 42 U.S.C. § 1982.

[3] The Ohio statute makes it unlawful for "any person" to "[r]efuse to sell . . . or otherwise deny or withhold *commercial* housing from any person because of race [or] color" of the prospective owned. 41 Ohio Rev. Code §§ 4112.02(H) and

Akron argues that this case is unlike *Reitman* v. *Mulkey* (387 U.S. 369 (1967)) in that here the city charter declares no right to discriminate in housing, authorizes and encourages no housing discrimination, and places no ban on the enactment of fair housing ordinances. But we need not rest on *Reitman* to decide this case. Here, unlike *Reitman*, there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters.

By adding section 137 to its charter the city of Akron, which unquestionably wields State power,[4] not only suspended the operation of the existing ordinance forbidding housing discrimination, but required the approval of the electors before any future ordinance could take effect.[5] Section 137 thus drew a distinction between those groups seeking the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends. Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule: The ordinance would become effective 30 days after passage by the city council, or immediately if passed as an emergency measure, and would be subject to referendum only if 10 percent of the electors so requested by filing a proper and timely petition.[6] Passage by the council sufficed unless the electors themselves invoked the general referendum provisions of the city charter. But for those who sought protection against racial bias, the approval of the city council was not enough. A referendum was required by charter at a general or regular election, without any provision for use of the expedited special election ordinarily available. The Akron charter obviously made it substantially more difficult to secure enactment of ordinances subject to setion 137.

Only laws to end housing discrimination based on "race, color, religion, national origin or ancestry" must run section 137's gauntlet. It is true that the section draws no distinctions among racial and religious

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4112.02(H)(1) (1965) (emphasis added). "Commercial housing" is defined to exclude "any personal residence offered for sale or rent by the owner or by his broker, salesman, agent, or employee." 41 Ohio Rev. Code § 4112.01(K) (1965). The statute makes it unlawful to "[p]rint, publish, or circulate any statement or advertisement relating to the sale [of a] . . . personal residence . . . which indicates any preference, limitation, specification, or discrimination based upon race . . . . "Since Miss Hunter does not seek commercial housing, or complain of the affront to her sensibilities of hearing a "circulated" statement (if the Ohio statute goes that far) she cannot obtain the relief she seeks under the Ohio statute.

[4] See, *e. g.*, *Evans* v. *Newton*, 382 U.S. 296 (1966); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

[5] Thus we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment.

[6] Ordinances may be initiated through a petition signed by 7% of the voters, and the city charter may be amended or measures enacted by the council repealed through a referendum which may be obtained on petition of 10% of the voters.

groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end. But section 137 nevertheless disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor. The automatic referendum system does not reach housing discrimination on sexual or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes.

Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot, *Anderson* v. *Martin* (375 U.S. 399 (1964)), section 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others. Cf. *Gomillion* v. *Lightfoot* (364 U.S. 339 (1960)); *Reynolds* v. *Sims* (377 U.S. 533 (1964)); *Avery* v. *Midland County* (390 U.S. 474(1968)). The preamble to the open housing ordinance which was suspended by section 137 recited that the population of Akron consists of "people of different race, color, religion, ancestry or national origin, many of whom live in circumscribed and segregated areas, under substandard, unhealthful, unsafe, unsanitary, and overcrowded conditions, because of discrimination in the sale, lease, rental, and financing of housing." Such was the situation in Akron. It is against this background that the referendum required by section 137 must be assessed.

Because the core of the 14th amendment is the prevention of meaningful and unjustified official distinctions based on race, *Slaughter-House Cases* (16 Wall. 36, 71 (1873)): *Strauder* v. *West Virginia* (100 U.S. 303, 307–308 (1880)): *Ex parte Virginia* (100 U.S. 339, 344–345 (1880)); *McLaughlin* v. *Florida* (379 U.S. 184, 192 (1964)); *Loving* v. *Virginia* (388 U.S. 1, 10 (1968)), racial classifications are "constitutionally suspect," *Bolling* v. *Sharpe* (347 U.S. 497, 499 (1954)), subject to the "most rigid scrutiny," *Korematsu* v. *United States* (323 U.S. 214, 216 (1944)). They "bear a far heavier burden of justification" than other classifications, *McLaughlin* v. *Florida* (379 U.S. 184, 194 (1964)).

We are unimpressed with any of the State's justifications for its discrimination. Characterizing it simply as a public decision to move slowly in the delicate area of race relations emphasizes the impact and burden of section 137, but does not justify it. The amendment was unnecessary either to implement a decision to go slowly or to allow the people of Akron to participate in that decision.[7] Likewise, insisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the 14th amendment. Nor does the implementation of this change through popular referendum immunize it. *Lucas* v. *Colorado General Assembly* (377 U.S. 713, 736–737 (1964)). The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed. Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size. Cf. *Reynolds* v. *Sims* (377 U.S. 533 (1964)); *Avery* v. *Midland County* (390 U.S. 474 (1968)).

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[7] The people of Akron had the power to initiate legislation, or to review council decisions, even before § 137. Seen n. 6, *supra*. The procedural prerequisites for this popular action are perfectly reasonable, as the gathering of 10% of the voters' signatures in the course of passing § 137 illustrates.

We hold that section 137 discriminates against minorities, and constitutes a real, substantial, and invidious denial of the equal protection of the laws.

Reversed.

Mr. Justice **Harlan**, whom Mr. Justice **Stewart** joins, concurring.

At the outset, I think it well to sketch my constitutional approach to State statutes which structure the internal governmental process and which are challenged under the Equal Protection Clause of the Fourteenth Amendment. For equal protection purposes, I believe that laws which define the powers of political institutions fall into two classes. First, a statute may have the clear purpose of making it more difficult for racial and religious minorities to further their political aims. Like any other statute which is discriminatory on its face, such a law cannot be permitted to stand unless it can be supported by State interests of the most weighty and substantial kind. *McLaughlin* v. *Florida* (379 U.S. 184, 192 (1964)).

Most laws which define the structure of political institutions, however, fall into a second class. They are designed with the aim of providing a just framework within which the diverse political groups in our society may fairly compete and are not enacted with the purpose of assisting one particular group in its struggle with its political opponents. Consider, for example, Akron's procedure which requires that almost any ordinance be submitted to a general referendum if 10 percent of the electorate signs an appropriate petition.* This rule obviously does not have the purpose of protecting one particular group to the detriment of all others. It will sometimes operate in favor of one faction; sometimes in favor of another. Akron has adopted the referendum system because its citizens believe that whenever an action of the city council raises the emotional opposition of any significant group in the community, the people should have a right to decide the matter directly. Statutes of this type, which are grounded upon general democratic principle, do not violate the equal protection clause simply because they occasionally operate to disadvantage Negro political interests. If a governmental institution is to be fair, one group cannot always be expected to win. If the council's fair housing legislation were defeated at a referendum, Negroes would undoubtedly lose an important political battle, but they would not thereby be denied equal protection.

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*Section 25 of Akron's City Charter exempts the following ordinances from the referendum procedure:

"(a) Annual appropriation ordinances. (b) Ordinances or resolutions providing for the approval or disapproval of appointments or removals made by Council. (c) Actions by Council on the approval of official bonds. (d) Ordinances or resolutions providing for the submission of any proposition to the vote of the electors. (e) Ordinances providing for street improvements petitioned for by owners of a majority of the feet front of the property benefited and to be specially assessed for the cost thereof."

It is not suggested that any of these exceptions were made with the purpose of disadvantaging Negro political interests.

This same analysis applies to other institutions of government which are even more solidly rooted in our history than is the referendum. The existence of a bicameral legislature or an executive veto may on occasion make it more difficult for minorities to achieve favorable legislation; nevertheless, they may not be attacked on equal protection grounds since they are founded on neutral principles. Similarly, the rule which makes it relatively difficult to amend a State constitution is commonly justified on the theory that constitutional provisions should be more thoroughly scrutinized and more soberly considered than are simple statutory enactments. Here, too, Negroes may stand to gain by the rule if a fair housing law is made part of the Constitution, or they may lose if the Constitution adopts a position of strict neutrality on the question. See *Reitman* v. *Mulkey* (387 U.S. 369, 389 (1967)) (Dissenting opinion of Harlan, J.). But even if Negroes are obliged to undertake the arduous task of amending the State constitution, they are not thereby denied equal protection. For the rule making constitutional amendment difficult is grounded in neutral principle.

In the case before us, however, the city of Akron has not attempted to allocate governmental power on the basis of any general principle. Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest. Since the charter amendment is discriminatory on its face, Akron must "bear a far heavier burden of justification" than is required in the normal case. *McLaughlin* v. *Florida* (379 U.S. 184, 194 (1964)). And Akron has failed to sustain this burden. The city's principal agrument in support of the charter amendment relies on the undisputed fact that fair housing legislation may often be expected to raise the passions of the community to their highest pitch. It was not necessary, however, to pass this amendment in order to assure that particularly sensitive issues will ultimately be decided by the general electorate. Akron has already provided a procedure, which is grounded in neutral principle, that requires a general referendum on this issue if 10 percent of the voters insist. If the prospect of fair housing legislation really arouses passionate opposition, the voters will have the final say. Consequently, the charter amendment will have its real impact only when fair housing does *not* arouse extraordinary controversy. This being the case, I can perceive no legitimate state interest which in any degree vindicates the action taken by the city here.

As I read the court's opinion to be entirely consistent with the basic principles which I believe control this case, I join in it.

Mr. Justice Black, dissenting.

Section 10, article I, of the Constitution provides, among other things, that "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." But there is no constitutional provision which bars any State from repealing any law on any subject at any time it pleases. Although the Court denies the fact, I read its opinion as holding that a city that "wields State power" is barred from repealing an existing ordinance that forbids discrimination in the sale, lease, or financing of real property "on the basis of race, color, religion, national origin or ancestry . . . ." The result of what the Court does is precisely as though it had commanded the State by mandamus or injunction to keep on its books and enforce what the Court favors as a fair housing law.

The Court purports to find its power to forbid the city to repeal its laws in the provision of the 14th amendment forbidding a State to "deny to any person within its jurisdiction the equal protection of the laws." For some time I have been filing my protests against the Court's use of the due process clause to strike down State laws that shock the Court's conscience, offend the Court's sense of what it considers to be "fair" or "fundamental" or "arbitrary" or "contrary to the beliefs of the English-speaking people." I now protest just as vigorously against use of the equal protection clause to bar States from repealing laws that the Court wants the States to retain. Of course, the Court, under the ruling of *Marbury* v. *Madison* (1 Cranch 137 (1803)), has power to invalidate State laws that discriminate on account of race. But it does not have power to put roadblocks to prevent States from repealing these laws. Here, I think the Court needs to control itself, and not, as it is doing, encroach on the States' powers to repeal its old laws when it decides to do so.

Another argument used by the Court supposed to support its holding is that we have in a number of our cases supported the right to vote without discrimination. And we have. But in no one of them have we held that a State is without power to repeal its own laws when convinced by experience that a law is not serving a useful purpose. Moreover, it is the Court's opinion here that casts aspersions upon the right of citizens to vote. I say that for this reason. Akron's repealing law here held unconstitutional, provides that an ordinance in the fair housing field in Akron "must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective." The Court uses this granted right of the people to vote on this important legislation as a key argument for holding that the repealer denies equal protection to Negroes. Just consider that for a moment. In this Government, which we boast is "of the people, for the people, and by the people," conditioning the enactment of a law on a majority vote of the people condemns that law as unconstitutional in the eyes of the Court. There may have been other State laws held unconstitutional in the past on grounds that they are equally as fallacious and undemocratic as those the Court relies on today, but if so I do not recall such cases at the moment. It is time, I think, to recall that the equal protection clause does not empower this Court to decide what State ordinances or laws a State may repeal. I would not strike down this repealing ordinance.

GAUTREAUX *v.* ROMNEY

71–1073 (7th Cir. 1971)

APPEAL

FROM THE U.S. DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

REMANDED—SEPTEMBER 10, 1971

Before SWYGERT, chief judge, DUFFY, senior circuit judge and FAIRCHILD, circuit judge.

DUFFY, senior circuit judge:

This suit is brought against the Secretary of the Department of Housing and Urban Development (HUD). Plaintiffs are all Negro tenants or applicants for public housing in the city of Chicago. They seek, on behalf of themselves and all other Negroes similarly situated, a declaration that the Secretary has "assisted in the carrying on . . . of a racially discriminatory public housing system, within the city of Chicago, Ill." Plaintiffs further seek to enjoin the Secretary from making available to the Chicago Housing Authority any Federal financial assets to be used in connection with or in support of the racially discriminatory aspects of the Chicago public housing system. "Such other and further relief as the court may deem just and equitable" is also requested.

Stated another way, the complaint herein challenges the role played by HUD [1] and its Secretary in the funding and construction of certain public housing in the city of Chicago. The role played by the Chicago Housing Authority (CHA), which is not a party to this suit, in the construction of the same public housing already has been held to have been racially discriminatory (*Gautreaux* v. *Chicago Housing Authority* (296 F. Supp. 907) (N.D.Ill., 1969)).[2] Further construction of public housing by CHA on a segregated site selection basis has been permanently enjoined. (304 F. Supp. 736). A good many of the facts pertaining to this present controversy are reported at 296 F. Supp. 907; 304 F. Supp. 736 and in this court's decision at 436 F. 2d 306 (7 Cir., 1970), cert. den. 402 U.S., 922 (1971). We shall avoid unnecessary repetition where possible.

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[1] The Department of Housing and Urban Development was created by Public Law No. 89–174, enacted on September 9, 1965. All duties of the Public Housing Administration and other predecessor agencies were transferred to the authority of HUD by that law. We shall refer to HUD as both the predecessor and present agency.

[2] Because of the racial distinctions expressly found to be present in the tenant assignment and site selection practices involved in the public housing sites at issue in the CHA case and in the present suit, we do not deal with a situation such as confronted the Supreme Court in its recent decision of *James* v. *Valtierra*, 402 U.S. 137 (1971).

The complaint in this case was filed simultaneously with the complaint in the *Gautreaux* v. *CHA* case, an order of the district court stayed all proceedings in this suit until disposition of the companion CHA case. Defendants moved to dismiss the complaint herein and filed certain affidavits and documents in support of said motion. On October 31, 1969, plaintiff moved for summary judgment under rule 56 (F.R.C.P.) asserting that no dispute as to any material fact existed.

On September 1, 1970, the district court entered its memorandum opinion dismissing all four counts of this complaint. Count I had been brought under the general Federal question statute (28 U.S.C. 1331) and the fifth amendment to the U.S. Constitution. It alleged that, the Secretary, through his action in funding and approving CHA's racially discriminatory programs, had violated the due process clause of that amendment. The court first found that plaintiffs had standing to bring suit under all counts and that the requisite jurisdictional amount was present. The court then concluded that "the fifth amendment under the circumstances here alleged [did] not authorize this suit." This ruling was a holding that there was a lack of jurisdiction to bring count I.

Jurisdiction as to count II was grounded on 28 U.S.C. 1331 and 28 U.S.C. 1343(4). Count II alleged that the Secretary's acts had violated 42 U.S.C. 2000d (sec. 601 of the Civil Rights Act of 1964). The district court dismissed count II for failure to state a claim upon which relief could be granted.[3] The court's dismissal was based upon the finding that HUD's financial assistance to CHA was insufficient to make it a "joint participant" in CHA's racially discriminatory conduct.

Counts III and IV were identical with counts I and II respectively, except that deliberate discriminatory conduct on the part of CHA had not been alleged. The district court dismissed these counts for failure to allege such deliberate CHA action.

Finally, the court expressed the view that the doctrine of sovereign immunity was, in part, applicable to bar his suit.

This appeal followed. The Government has abandoned both the lack of jurisdiction as to count I and sovereign immunity as possible grounds for affirmance. Plaintiffs have not strongly contested the dismissal of counts III and IV of the complaint. Thus, the central question presented for review reduces to whether summary judgment in favor of either party is proper on counts I or II of the complaint. The Government argues that the district court's grant of summary judgment in its favor is proper and advances as an additional ground for affirmance the contention that the case is now moot.

The Government's position on appeal is that this present suit is somewhat superfluous inasmuch as full and complete equitable relief has been made available to these same plaintiffs through the *Gautreaux* v. *Chicago Housing Authority* case. (See: 296 F. Supp. 907; 304 F. Supp. 736.) The Government is said to be in complete agreement with the "aims and objectives" of that case and that proposition is not strongly contested by the plaintiffs here.

We understand this contention by the Secretary to bear upon only two issues: Mootness, and the scope of any equitable relief which might be deemed necessary by the district court. The second issue, the extent of possible equitable relief is extremely important, but is not before this court on this present appeal. We deal here only with whether summary judgment in favor of either party is proper on the issue of the Secretary's alleged *liability* for events which occurred in prior years. Liability for past conduct is totally separate from the question of appropriate future relief. In deciding the liability issue, it would thus not be appropriate for us to consider the effect which the decree entered in the companion case (304 F. Supp. 736) might have in minimizing the need for an extensive decree in this suit.

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[3] Since supporting affidavits and other documents had been submitted by both parties, this should actually be treated as the grant of a motion for summary judgment. Rule 12(b), Rule 56 F.R.C.P.

Similarly, a determination of just what type of equitable remedy might be appropriate in cases of this sort is a question best left initially to the sound discretion of the district court. *Brown* v. *Board of Education* (Brown II) (349 U.S. 294 (1955)); *Swann* v. *Charlotte-Mecklenburg Board of Education* (402 U.S. 1 (1971)). Even though to the writer of this opinion it might appear that extensive relief would not be necessary, we do not, in any way, wish to anticipate the district court on an issue properly for its decision.

Thus, the only issue presently before us which might be affected by the entry of the *Gautreaux* v. *CHA* injunction is mootness. We shall consider the effect of the prior injunction as it bears on that issue.

Before turning to the issues, however, this court wishes to state its strong support for the actions of the district judge throughout the course of this entire litigation. The district judge who decided the *Gautreaux* v. *CHA* case and who has supervised the decree entered thereto, is the same district judge who dismissed this present suit. The administration of the decree in the former case has unquestionably been a difficult and time-consuming task, presenting unique problems for resolution,[4] and generating enormous public interest. This court would be extremely reluctant to interfere with the exercise of that district judge's sound discretion in matters pertaining to this controversy, and no statement in this opinion should be so construed. Nevertheless, since important issues of law are presented by this appeal and since the basis of the district court's dismissal of this present suit below seems to have been a feeling that "the putative limits [of the court's] powers" had been "effectively circumscribed," rather than a feeling that discretion dictated the dismissal of a suit thought to be unnecessary, it is apparent that review by this court is compelled.

JURISDICTION AS TO COUNT I

Since courts always are free to review jurisdiction, we shall examine this point briefly even though not contested by defendant on appeal. We find jurisdiction under 28 U.S.C. 1331 and the fifth amendment to be present in this case. The jurisdictional statute speaks in alternative terms with respect to the "Constitution, laws *or* treaties of the United States. . . ."[5] Thus, a plain reading would seem to encompass a suit of this present type which directly challenges conduct alleged to have violated the fifth amendment. That such a reading is correct was settled by the Supreme Court in *Bell* v. *Hood* (327 U.S. 678 (1946)) where the Court held that: ". . . where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the Federal court . . . must entertain the suit." 327 U.S., 681–2. See also: *Bolling* v. *Sharpe* (347 U.S. 497 (1954)); *Hicks* v. *Weaver* (302 F.Supp. 619 (D.La., 1969)). Jurisdiction would still exist even though we were of the opinion that no cause of action under count I had been stated. *Bell* v. *Hood*, *supra*, at 682. Since all other requirements under 28 U.S.C. 1331 have been met, we find that jurisdiction is present under count I to bring a suit in equity challenging alleged racial discrimination which is said to have violated the fifth amendment.[6]

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[4] For an account of at least one set of unique problems confronting the District Judge see this Court's opinion in *Gautreaux* v. *Chicago Housing Authority*, 436 F. 2d 306.

[5] The statute reads in full: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000. exclusive of interests and costs, and arises under the Constitution, laws or treaties of the United States."

Sovereign Immunity

Since the defendant has chosen to abandon any claim of sovereign immunity on appeal, we do not think that that point merits an extended discussion on our part. In any case, the doctrine does not bar a suit such as this which is challenging alleged unconstitutional and unauthorized conduct by a Federal officer. *Dugan* v. *Rank* (372 U.S. 609 (1963)); *Bolling* v. *Sharpe*, *supra*; *Shannon* v. *HUD* (436 F. 2d 809 (3 Cir., 1970)). See also: *Powelton Civic Homeowners Association* v. *HUD* (284 F. Supp. 809 (E.D.Pa., 1968)); *Hicks* v. *Weaver*, *supra*.

Mootness

As noted previously, this appeal follows the entry of an extensive judgment order in *Gautreaux* v. *Chicago Housing Authority* (304 F. Supp. 736, as modified in 436 F. 2d 306). The decree provides in part that CHA shall not ". . . seek any approval or request or accept any assistance from any Government agency with respect thereto . . ." unless the plan for such assistance complies with other provisions of the court's decree. The Secretary contends that HUD's stated full agreement with the aims and objectives of the judgment order, along with the issuance of an injunction against the exact practices now before us, make this present controversy moot.[7]

To some extent, the Secretary's argument is that its own voluntary promise to abide by the decision in the companion case and to stop any further racially discriminatory acts on its part is a viable ground for this court to dismiss for mootness. We have no doubt that such assertions are offered in good faith, but we do not think that they are sufficient for us to hold this appeal moot. It long has been held that ". . . voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States* v. *W. T. Grant* (345 U.S. 629, 632 (1953)).

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[6] We agree with the District Court that the requisite jurisdictional amount has been stated.

[7] Had the cases been consolidated and decided together, the possibility of mootness would not, of course, have arisen. Thus, in *Hicks* v. *Weaver*, *supra*, the Court entered an injunction against *both* the local housing authority and the Secretary of HUD.

A more persuasive argument is that the injunction entered in *Gautreaux* v. *CHA* renders this controversy moot since CHA is now prohibited from "accept[ing] any assistance from [HUD]" unless CHA's programs strictly comply with the specifications of the decree in that case. Thus, it is argued, a ruling here would be merely "advisory," lacking "concrete legal issues, presented in actual cases. . . ." *United Public Workers of America* v. *Mitchell* (330 U.S. 75, 89 (1947)), quoted in *Golden* v. *Zwickler* (394 U.S. 103, 108 (1969)).

We conclude, however, that the entry of the companion decree does not make this suit moot. The fact that some of the injunctive relief originally requested is no longer possible does not affect the issues presently before us. "Where several forms of relief are requested and one of these requests subsequently becomes moot, the court has still considered the remaining requests." *Powell* v. *McCormack* (395 U.S. 486, 496, n. 8 (1969)). In this suit, both declaratory and injunctive relief against construction of specific projects was originally sought. Since some of those projects now have been completed, it is obvious that full injunctive relief in favor of plaintiffs cannot now be given. But that fact does not, of itself, make this case moot. *Shannon* v. *HUD*, *supra*, at 822.[8] At the present time, a declaratory judgment as well as such "other and further relief as the court may deem just and equitable" is requested.

Plaintiffs have contended that such "other and further relief" might include a more vigorous utilization of the several different types of housing programs which HUD administers in the form of a decree aimed at ". . . remedying the continuing effects of the discrimination of the past."[9] Such a decree arguably would represent an equitable remedy going beyond the scope of relief made available through the companion case and, it is contended, might facilitate the overall desired goal of desegregating the public housing sites around Chicago metropolitan area. We express no view on whether such requested relief is either necessary or appropriate. However, as long as a decree utilizing certain HUD programs still remains a possible form of relief not already available through the other case, this court cannot deem the controversy moot. *Powell* v. *McCormack*, *supra*.

Moreover, even if only the declaratory judgment were demonstrated to be appropriate at the time, this court would not necessarily be compelled to dismiss for mootness as long as the requisite "case" or "controversy" exists. "A court may grant a declaratory relief even though it chooses not to issue an injunction or mandamus. . . . A declaratory judgment can then be used as a predicate to further relief, including an injunction." *Powell* v. *McCormack*, *supra*, at 499.

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[8] The *Shannon* court stated: "The defendants suggest that because the project has been completed and occupied by rent supplement tenants there is no longer any relief which may feasibly be given. The completion of the project and the creation of intervening rights of third parties does indeed present a serious problem of equitable remedies. It does not, however, make the case moot in the Article III sense. Relief can be given in some form."

[9] For example, we are advised that "Section 236 Housing" is a low income housing program designed to increase the flow of such housing by favorable interest assistance payments to the mortgage lender. Unlike the public housing programs now before us, local governmental approval is not required for such housing to be constructed. See also: "Section 235" and "Section 231" housing programs.

Contrary to the Secretary's arguments, we do not think that the controversy here has been rendered abstract by the injunction against CHA's further use of Federal funds in a manner not in compliance with the *Gautreaux* v. *CHA* plan. A determination of whether or not the Secretary's own past conduct violated the Constitution or applicable Federal statute remains very much of an open question. The entry of a declaratory judgment here would have significant consequences in determining the extent of any further relief deemed necessary, in the event that practices found to be discriminatory were resumed. Most important of all, the decree in the *CHA* case, thorough though it may be, is not binding against HUD or its Secretary.[10] Thus, at the present time, plaintiffs are in the anomalous position of having the full force of the Federal judicial power at their command to enforce proven rights against CHA, yet having to rely solely on the voluntary promises of a party whose role is equally important, whose decisions pertaining to this matter may prove to be among the best means of insuring full compliance with the aims and objectives of the CHA decree,[11] but who never has been a party to that case or bound by its terms.

Under such circumstances, we must conclude that the issues before us are capable of repetition yet evading review and that the case is not moot. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission* (219 U.S. 498 (1911)), quoted in *Moore* v. *Ogilvie* (394 U.S. 814 (1969)). Viewed another way, we are confronted here with "... a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment," *Golden* v. *Zwickler*, *supra*, at 108.

Whether a Claim Is Stated Under the Fifth Amendment or Section 601 of the 1964 Civil Rights Act

We turn then to the merits. The Government admits that HUD approved and funded CHA-chosen regular family housing sites between 1950 and 1969, knowing that such sites were not optimal and that the reason for their exclusive location in black areas of Chicago was that sites other than in the south or west side, if proposed for regular family housing, invariably encounter[ed] sufficient opposition in the [Chicago City] Council to preclude council approval." (Letter from a Public Housing Administration official to the chairman of the West Side Federation, October 14, 1965.)

Nevertheless, the district court found that HUD had followed this course only after having made "numerous and consistent efforts . . . to persuade the Chicago Housing Authority to locate low-rent housing projects in white neighborhoods." That finding is not directly challenged on appeal. Moreover, given the acknowledged desperate need for public housing in Chicago,[12] HUD's decision was that it was better to fund a segregated housing system than to deny housing altogether to the thousands of needy Negro families of that city.

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[10] Thus this suit is unlike *Watkins* v. *CHA*, 406 F.2d 1234 (7 Cir., 1969) where reinstatement of previously evicted named plaintiffs rendered the cause moot, as between the original parties to that same case.

[11] Favorable HUD action, for example, might have been a factor in the district court's decision to modify the "best efforts" clause of the original Judgment Order in that case so as to order submission of approximately 1500 sites to the City Council in accordance with a specific timetable. See: 436 F.2d 306, 310.

On review of the district court's action, we shall treat all of the above facts as true. The question then becomes whether or not, even granting that "numerous and consistent efforts" were made, HUD's knowing acquiescence in CHA's admitted discriminatory housing program violated either the due process clause of the fifth amendment or section 601 of the Civil Rights Act of 1964.[13] Given a previous court finding of liability against CHA (296 F. Supp. 907), the pertinent case law compels the conclusion that both of these provisions were violated.

HUD's approval and funding of segregated CHA housing sites cannot be excused as an attempted accommodation of an admittedly urgent need for housing with the reality of community and city council resistance. This question was argued and settled in the companion case as to these exact housing sites and the same city council. The district judge there well stated the applicable rule:

> It is also undenied that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low-cost housing and urban renewal. Nevertheless, a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued.

(296 F. Supp. at 914.)

This court applied much the same rule in affirming a modification of the judgment order in the companion decision and in ordering submission of 1,500 HUD-approved sites to the city council in accordance with a specific timetable. In rejecting a plea for delay, we pointed to several cases holding ". . . that 'abstention' is inappropriate in constitutional cases of this sort and that community hostility is no reason to delay enforcement of proven constitutional rights." (436 F. 2d at 312.)

Courts have held that alleged good faith is no more of a defense to segregation in public housing than it is to segregation in public schools. *Gautreaux* v. *Chicago Housing Authority* (296 F. Supp. 907); *Kennedy Park Homes Assn.* v. *City of Lackawanna* (436 F. 2d 108 (2 Cir., 1970)), certiorari denied, 401 U.S. 1010 (1971). Moreover, the fact that it is a Federal agency or officer charged with an act of racial discrimination does not alter the pertinent standards, since ". . . it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling* v. *Sharpe*, *supra*, at 500. See also: *Green* v. *Kennedy* (309 F. Supp. 1127, 1136 (D.C.D.C. 1970)), appeal dismissed 398 U.S. 956 (1970). The reason for courts' near uniform refusal to examine purported good faith motives behind alleged discriminatory acts was, perhaps, most succinctly put by the Supreme Court in *Burton* v. *Wilmington Parking Authority* (365 U.S. 715, 725 (1963)): "It is no consolation to an individual denied the equal protection of the laws that it was done in good faith."

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[12] The Government's brief points to affidavits submitted by many of the present plaintiffs which starkly illustrate that fact. Plaintiff Gautreaux has accepted public housing in Negro areas only because she had been living in a one bedroom apartment with a family of six. Plaintiff Odell Jones had moved to segregated public housing with his wife and three children to escape their two rooms in which "the rats had begun to run over the house at will."

[13] "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

The fact that a governmental agency might have made "numerous and consistent efforts" toward desegregation has not yet been held to negate liability for an otherwise segregated result. Thus, for example, in *Cooper* v. *Aaron* (358 U.S. 1 (1958)) the local school board admittedly had been "going forward with its preparation for desegregating the Little Rock [Arkansas] school system" (358 U.S. at 8), but was still held liable when it abandoned those plans in the face of stiff community and State governmental resistance. See also: *Watson* v. *City of Memphis* (373 U.S. 526, 535 (1963)); *Green* v. *Kennedy*, *supra*, at 1136.

With the foregoing considerations in mind, then, it is apparent that the "dilemma" with which the Secretary no doubt was faced and with which we are fully sympathetic nevertheless cannot bear upon the question before us. For example, we have been advised that any further HUD pressure on CHA would have meant cutting off funds and thus stopping the flow of new housing altogether. Taking this assertion as true, still the basis of the "dilemma" boils down to community and local governmental resistance to ". . . the only constitutionally permissible State policy. . . ." *Green* v. *Kennedy*, *supra*, at 1137, a factor which, as discussed above, has not yet been accepted as a viable excuse for a segregated result. So even though we fully understand the Secretary's position and do not, in any way, wish to limit the exercise of his discretion in housing related matters, still we do not feel free to carve out a wholly new exception to a firmly established general rule which, for at least the last 16 years, has governed the standards of assessing liability for discrimination on the basis of race.[14]

Turning to the facts now before us, there can be no question that the role played by HUD in the construction of the public housing system in Chicago was significant. The great amount of funds for such construction came from HUD. Between 1950 and 1966 alone HUD spent nearly $350 million on CHA projects. The Secretary's trial brief acknowledged that "in practical operation of the low-rent housing program, the existence of the program is entirely dependent upon continuing, year to year, Federal financial assistance." We find no basis in the record with which to disagree with that conclusion. Moreover, within the structure of the housing programs as funded, HUD retained a large amount of discretion to approve or reject both site selection and tenant assignment procedures of the local housing authority. HUD's "annual contributions contract" contained detailed provisions concerning program operations and was accompanied by eight pages of regulations on the subject of site selection alone.

It also is not seriously disputed on appeal that the Secretary exercised the above described powers in a manner which perpetuated a racially discriminatory housing system in Chicago, and that the Secretary and other HUD officials were aware of that fact. The actual aspects of that segregated system are fully described at 296 F. Supp. 907 and we shall not recount them here. The fact that HUD knew of such circumstances is borne out by the district court's specific finding in this suit that HUD tried to block "the activity complained of, succeeded in some respects, but continued funding knowing of the possible action the city council would take." This finding is supported by, among other record items, the HUD letter to the West Side Federation previously referred to (page 15), and by the affidavit of HUD official Bergeron recalling his unsuccessful attempts in the early 1950's "to enlist [Mayor Kennelly's] assistance in having project sites located in white neighborhoods."

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[14] ". . . it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown* v. *Board of Education* (Brown II), *supra*, at 300.

On such facts, and given the inapplicability of HUD's "good faith" arguments, we are unable to avoid the conclusion that the Secretary's past actions constituted racially discriminatory conduct in their own right.[15] The fact that the Secretary's exercise of his powers may have more often reflected CHA's own racially discriminatory choices than it did any ill will on HUD's part, does not alter the question now before us.

We are fully sympathetic to the arguments advanced by the Government on appeal, especially, as mentioned above, to the very real "dilemma" which the Secretary faced during these years. On the other hand, against such considerations are not only the principles of law discussed heretofore, but also two recent decisions which hold against this same defendant (or predecessor) and which deal with similar facts. *Shannon* v. *HUD*, *supra; Hicks* v. *Weaver*, *supra*. We do not think we should ignore those cases.

In holding the Secretary liable on nearly identical facts as are now before us, the *Hicks* court reasoned as follows:

> As noted above, HUD was not only aware of the situation in Bogalusa [Louisiana] but it effectively directed and controlled each and every step in the program. HUD thus sanctioned the violation of plaintiffs' rights and was an active participant since it could have halted the discrimination at any step in the program. Consequently, its own discriminatory conduct in this respect is violative of 42 U.S.C. section 2000d.

(302 F. Supp. at 623).

Likewise, in *Shannon* the third circuit recently enjoined further action on a HUD decision to change a proposed housing project in Philadelphia from the originally contemplated owner occupied buildings to a 100 percent rent supplement assistance program (which was found to be the "functional equivalent of a low rent public housing project.") (436 F. 2d at 819). The *Shannon* court acknowledged that HUD was vested with broad discretion to supervise its various programs, but held, nevertheless, that ". . . that discretion must be exercised within the framework of the national policy against discrimination in federally assisted housing . . . and in favor of fair housing. . . ." (436 F. 2d at 819.)

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[15] Our holding thus is not based on the "joint participation" doctrine set forth in *Burton* v. *Wilmington Parking Authority*, *supra*, and relied upon in the District Court litigation below. We need not discuss the applicability of that doctrine, for it is concerned with a different inquiry, namely, "upon identifying the requisite 'state action' ". (*Griffin* v. *Breckenridge*, 402 U.S. . . ., 39 Law Week 4691) sufficient to render admitted discrimination actionable under the Fourteenth Amendment. In any event, contrary to the Government's assertions on appeal, "joint participation" already has been "extended" to federal government operations. *Simpkins* v. *Moses T. Cone Memorial Hospital*, 323 F. 2d 959 (4 Cir., 1963), cert. den. 376 U.S. 938; *Smith* v. *Hampton Training School for Nurses*, 360 F.2d 477 (4 Cir., 1966).

We can find no viable basis for distinguishing the *Hicks* and *Shannon* decisions. The Secretary contends that the relief requested in those two cases differed from that which is sought here. The Government's argument is entirely correct, but has no bearing on the issue of actual liability which, as mentioned previously (page 6) is the only issue now before this court. The Government's further contention, advanced at oral argument, that *Shannon* should be distinguished as involving only a more stable integrated neighborhood trying to stave off additional public housing, is also factually correct, but legally insignificant. Such a factor might arguably affect the standing of individual plaintiffs to bring suit, but it does not alter the pertinent standard for answering the question of whether or not racial discrimination in the funding and approval of particular programs has occurred.

Finally, we emphasize, as did the *Shannon* court, that: ". . . there will be instances where a pressing case may be made for the rebuilding of a racial ghetto." (436 F. 2d at 822.) However, the situation before us now already has been held not to constitute such a pressing case, and such is the determinative factor. Where the court in the companion decision previously has held that CHA's "deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued" (296 F. Supp. at 914), it is not possible with consistency to apply a lesser standard against HUD in assessing whether it, too, is liable for its role on the same identical facts.

So, even while we are fully sympathetic to the arguments advanced by the Secretary on appeal, we must conclude that the great weight of the caselaw favors plaintiffs' position. Since there exist no controverted issues of material fact, we conclude that summary judgment should be granted in plaintiffs' favor on both counts I and II of the complaint. We hold that HUD, through its Secretary, violated the due process clause of the fifth amendment (*Bolling* v. *Sharpe*, *supra; Hicks* v. *Weaver*, *supra*) and also has violated section 601 of the Civil Rights Act of 1964 (*Shannon* v. *HUD*, *supra; Hicks* v. *Weaver*, *supra*).

In so holding we state only that the Secretary must be adjudged liable on these particular facts and again point out that our holding should not be construed as granting a broad license for interference with the programs and actions of an already beleaguered Federal agency. It may well be that the district judge, in his wise discretion, will conclude that little equitable relief above the entry of a declaratory judgment and a simple "best efforts" clause will be necessary to remedy the wrongs which have been found to have been committed.

Such considerations, however, are not the subject for present decision, and we defer to the district court for their resolution.

Remanded.

SHANNON *v.* HUD

436 F.2d 809 (3d Cir. 1970)

APPEAL

FROM THE U.S. DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

ARGUED—OCTOBER 6, 1970

FILED—DECEMBER 10, 1970

OPINION OF THE COURT

GIBBONS, circuit judge.

Plaintiffs-appellants in this action are white and black residents (some homeowners and some tenants), businessmen in, and representatives of private civic organizations in the East Poplar Urban Renewal Area of Philadelphia. They sue in their own right, and as class representatives of others similarly situated pursuant to rules 23 and 17(b) of the Federal Rules of Civil Procedure. The individual defendants are those Federal officials of the Department of Housing and Urban Development responsible for implementing the several Federal statutes on fair housing and urban development. The Department of Housing and Urban Development (HUD) is also named as a defendant. Their complaint seeks a preliminary and a final injunction against the issuance of a contract of insurance or guaranty, and against the execution or performance of a contract for rent supplement payments, for Fairmount Manor, an apartment project which, when the complaint was filed, was about to be constructed in the East Poplar Urban Renewal Area. Jurisdiction is claimed under 28 U.S.C. 1331 (Federal questions) under 28 U.S.C. 1361 (mandamus against Federal officials), under 28 U.S.C. 1343 (civil rights), and 28 U.S.C. 2201 (declaratory judgments). A number of substantive and procedural irregularities are alleged in the steps leading to Federal approval of the contract of insurance and the approval of the project for a rent supplement contract. The essential substantive complaint is that the location of this type of project on the site chosen will have the effect of increasing the already high concentration of low income black residents in the East Poplar Urban Renewal Area. The essential procedural complaint preserved on appeal is that in reviewing and approving this type of project for the site chosen. HUD had no procedures for consideration of and in fact did not consider its effect on racial concentration in that neighborhood or in the city of Philadelphia as a whole.

The district court denied plaintiffs' application for a preliminary injunction. It also denied defendants' rule 12 motion to dismiss for failure to state a claim or for lack of jurisdiction. The defendants then filed an answer alleging lack of standing on the part of the plaintiffs, sovereign immunity, administrative discretion, and due compliance with all substantive and procedural requirements of the applicable law. An accelerated final hearing followed. On October 7, 1969, the district court filed an opinion containing findings of fact and conclusions of law and entered a final judgment dismissing the complaint.

We have been advised by the parties, although the facts do not fully appear in the record, that while the suit was pending construction of Fairmount Manor proceeded to completion and that the project is now occupied. We have also been advised that no mortgage insurance contract has been issued by HUD insuring a permanent mortgage on the project.

Fairmount Manor is designated a "221(d)(3)" project. This type housing project is authorized by section 221(d)(3) of the Housing Act of 1954 (68 Stat. 590.599, 12 U.S.C. sec. 17151(d)(3)). This mode of assistance, designed to assist private industry in providing for low and moderate income families (12 U.S.C. sec. 17151(a)), provides that HUD may insure mortgages on housing owned by eligible sponsors for the entire replacement cost of the project (12 U.S.C. sec. 17151 (d)(3)(iii). Sponsors eligible for such 100 percent mortgage insurance include private nonprofit corporations. Philadelphia Housing Development Corporation (PHDC) is an eligible nonprofit corporation which was formed for the express purpose of becoming a sponsor for Fairmount Manor. It made application to HUD for mortgage insurance under section 221(d)(3), 21 U.S.C. section 17151(d)(3), which was approved on November 20, 1968. As is often the case with such nonprofit sponsors, there is a connection between the nonprofit sponsor and a commercial real estate developer, in this case Abram Singer & Sons (Singer).

Rent supplement contracts are authorized by section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. sec. 1701s). That statute authorizes HUD to contract with "housing owners" to make annual payments on behalf of "qualified tenants." "Qualified tenants" are individuals or families having incomes below the maximum permitted in the area for occupation of public housing dwellings (12 U.S.C. sec. 1701s(c)(1)), and who are occupying substandard housing, or have been displaced by condemnation or disaster, or are physically handicapped or aged (12 U.S.C. sec. 1701s(c)(2)). "Qualified tenants" are, in short, tenants who, but for the rent supplement contract pursuant to which the Government pays part of their rent, would be living either in low-rent public housing or in slum housing. "Housing owners," for purposes relevant to this case, are 221(d)(3) nonprofit sponsors.[1] Prior to its approval of Fairmount Manor for 221(d)(3) mortgage insurance, HUD approved PHDC as a "housing owner" and Fairmount Manor as a project eligible for 100-percent occupancy by "qualified tenants" receiving rent supplement assistance. Such approval did not require that PHDC rent only to "qualified tenants," but only that if it did so the Government would pay a rent supplement for all such tenants. The record does not disclose what percentage of the tenants now occupying the project are "qualified tenants."

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[1] 12 U.S.C. § 1701s(b). This section further provides: Such term also includes a private nonprofit corporation or other private nonprofit legal entity, a limited dividend corporation or other limited dividend legal entity, or a cooperative housing corporation, which is the owner of a rental or cooperative housing project financed under a State or local program providing assistance through loans, loan insurance, or tax abatement and which prior to completion or construction or rehabilitation is approved for receiving the benefits of this section. Subject to the limitations provided in subsection (h) of this section, the term "housing owner" also has the meaning prescribed in such subsection.

Fairmount Manor is located between Sixth and Seventh Streets and Fairmount Avenue and Green Street in North Philadelphia. It is within the East Poplar Urban Renewal Area, which is bounded, in turn, by Fifth and Ninth Streets and Spring Garden Street and Girard Avenue. East Poplar is the subject of an urban renewal plan. That plan was formulated by the Philadelphia Redevelopment Authority, which is a local public agency (LPA) within the meaning of the Housing Act of 1949 (42 U.S.C. sec. 1450 et seq.). That statute authorizes HUD to advance loans and grants to local public agencies for urban renewal projects. The LPA first formulated an urban renewal plan for East Poplar on October 24, 1958. This plan was formally revised on five occasions, and the presently effective plan is the fifth amended plan for East Poplar, dated June 1964. Federal funds were made available for site acquisition and other purposes in connection with the East Poplar urban renewal plan pursuant to a loan and grant contract between HUD and the LPA.

Under section 101(c) of the Housing Act of 1949 no contract may be entered into by HUD for Federal financial assistance, and no mortgage may be insured, unless there is presented to the Secretary

> . . . by the locality a workable program for community improvement (which shall include an official plan of action, as it exists from time to time, for effectively dealing with the problem of urban slums and blight within the community and for the establishment and preservation of a well-planned community with well-organized residential neighborhoods of decent homes and suitable living environment for adequate family life), for utilizing appropriate private and public resources to eliminate, and prevent the development or spread of, slums and urban blight . . . (42 U.S.C. sec. 1451(c)).

Section 105(d) of the Housing Act of 1949 (42 U.S.C. sec. 1455(d)), provides:

> No land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing.

The legislative history of section 105(d) indicates that it was intended to give the public in an affected area an opportunity to be heard with respect to an urban renewal plan before the LPA entered into a contract for Federal financial aid.[2] HUD has no published regulations in the Code of Federal Regulations respecting the time or manner of conducting a section 105(d) public hearing, nor has it published such regulations respecting the manner in which a LPA will satisfy HUD that it has a workable program for community improvement. Instead, the agency has published for internal departmental use an Urban Renewal Handbook. That handbook recognizes that a modification of an urban renewal plan may be of such magnitude as to require a new section 105(d) hearing. Urban Renewal Handbook, RHA 7206.1, chapter 3. The handbook also specifies what submissions must be made by a LPA to satisfy HUD respecting compliance with the workable program for community improvement under section 101(c). Among the submissions required is one designated R 215:

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[2] See 95 Cong. Rec. 4864 (1949) (remarks of Senator Cain). This amendment to the bill was proposed from the floor by Senator Cain.

> Report on minority group considerations, if project will result in substantial net reduction in supply of housing in project areas available to racial minority families.

The last time a section 105(d) hearing was held on a revision of the East Poplar plan was prior to the fifth amendment, which was prepared by the LPA in June of 1964 and submitted to the Urban Renewal Administration[3] in October 1965. That submission contained a form R 215 which stated:

> The proposed redevelopment of this section of the East Poplar Urban Renewal Area is for residential and commercial purposes and will not result in a substantial reduction in housing for minority group families.

The original urban renewal plan, adopted in 1959, called for a combination of rehabilitation of structures by property owners in part of the area, and of site acquisition in another part. Within the tract to be acquired existing structures deemed nonsalvageable were to be cleared, and salvageable structures were to be conveyed to a redeveloper for rehabilitation as single family and multifamily owner occupied dwellings. In addition the redeveolper was to erect 244 single family owner occupied units. The changes approved in amendments 1 through 5 left these features of the plan essentially unchanged.

Plaintiffs claim that in reliance on the original plan and subsequent amendments, which contemplated redevelopment of the Fairmount Manor area primarily for single family owner-occupied homes, they made substantial investments, commitments, and in some cases home purchases. Rehabilitation of some 70 structures originally deemed salvageable did not proceed on schedule and these were eventually vandalized. In 1966 these were, with HUD approval (granted without a section 105(d) hearing), demolished. Of the 244 new single family dwellings only 70 have been erected to date.

Thus in 1966 the vision if not the letter of the fifth amended plan seemed largely frustrated in this area of East Poplar. Singer, because of financial contingencies in his contract with the LPA, was not technically in default on those contracts. Singer proposed a 221(d)(3) project with Federal rent supplements, to be built by him for a nonprofit sponsor. The LPA entered into a revised contract with Singer for such a project on September 26, 1967. This contract referred to a

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[3] The Urban Renewal Administration was an agency within the Housing and Home Finance Agency (HHFA). That organizational structure was abolished, and the functions of the HHFA transferred to the Secretary of the Department of Housing and Urban Development in 1965. Public Law 89–174, Sept. 9, 1965, 79 Stat. 669, 42 U.S.C. § 3534.

221(d)(3) project for families of moderate income, but it is undisputed that at all times after the project was first discussed a 221(d)(3) project with rent supplements was contemplated. Prior to the execution of the September 26, 1967, contract between Singer and the LPA, the proposed change in the plan was submitted in some form to the HUD Assistant Regional Administrator for Renewal Assistance, who on June 30, 1967, informed the LPA that the maximum housing density permitted by the urban renewal plan would have to be reduced as a prerequisite to HUD approval (exhibit P–61). A new submission with lower housing density was submitted. On November 3, 1967, the HUD Assistant Regional Administrator advised the Regional Administrator as follows:

> We have reviewed the subject application in accordance with the provisions of sections 2-2-3 and 2-2-4 of volume VII, Field Service Manual, and find that the Alternate Procedure No. 2, Approval of Proposed Revision and Local Approvals by the Regional Administrator is appropriate.
>
> Findings:
>
> 1. No aspect of the proposed change makes necessary or desirable referral to the Deputy Assistant Secretary for Renewal Assistance.
> 2. This amendment merely reduces the maximum dwelling unit density from 59 per acre to 32 in a one block area of the project consistent with FHA approval.
> 3. Since this revision is of a minor nature and represents no substantial departure from the ordinance adopted approving the previous urban renewal plan, no formal approval by city council is necessary.
>
> Recommendation:
>
> Your approval of the proposed revision to the urban renewal plan is recommended. If you concur in the above findings, an appropriate letter to the LPA is attached for your signature. (Exhibit P–61.)

The same day the HUD Regional Administrator approved the proposed revision in the plan (exhibit P–61.) There was no final approval for rent supplements, however, until September of 1968.

The November 3, 1967, approval of a revision in the plan was made without any section 105(d) hearing and without any submission of an R 215 Report on Minority Considerations. It was made pursuant to what local HUD officials describe as a "red line" procedure. The Urban Renewal Handbook states:

> A proposed change in the project may require a new public hearing under the provisions of State or local law or the contract for loan and grant. The LPA shall consult the regional office concerning the necessity for a new hearing. (RHA 7206.1, ch. 3.)

HUD does not require a public hearing with respect to every change in a plan. A memorandum from HUD Assistant Regional Administrator dated December 29, 1966, formalizes a procedure for approving minor changes in a plan in an informal manner. That memorandum provides in part:

> Since all red pencil changes are changes to the renewal plan, they must be reviewed by the planning branch. Here is where the regional office determines:
>
> (1) Whether the change constitutes a material alteration in a basic element of the plan; and
>
> (2) Whether or not the change is acceptable to us from a planning viewpoint. (Exhibit P–68, p. 2.)

The change in the plan from that set forth in the fifth amended plan required a change in zoning. In March of 1968 the city of Philadelphia held a public hearing on the zoning change and in May 1968, passed an ordinance approving it. This zoning amendment hearing was not, however, a public hearing pursuant to section 105(d), since HUD had long since determined to approve the change in the plan under the "red line" procedure. Neither in November 1967, when the revision to the plan was approved, nor in September 1968, when Federal officials gave final approval to the previously requested 221(d)(3) mortgage insurance and to rent supplement assistance, did HUD require any new section 105(d) hearing or any new submission of a Report on Minority Group Considerations. Plaintiffs claim these actions were invalid.

In addition to the Housing Act of 1949, plaintiffs rely on two other statutes. These are title VI of the Civil Rights Act of 1964, Public Law 88–352, title VI, July 2, 1964 (78 Stat. 252, 42 U.S.C. 2000d et seq.), and title VIII of the Civil Rights Act of 1968, Public Law 90–284, title VIII, April 11, 1968 (82 Stat. 81, 42 U.S.C. 3601 et seq.). The 1964 act provides in part:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (42 U.S.C. 2000d.)
>
> Each Federal department which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.... (42 U.S.C. sec. 2000d–1).

The 1968 act provides in part:

> It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States (42 U.S.C. sec. 3601).
>
> (d) The Secretary of Housing and Urban development shall
>
> *   *   *   *   *
>
> (5) Administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter (42 U.S.C. 3608(d)(5)).

The 1968 Civil Rights Act in other sections prohibits a number of discriminatory practices in the sale, rental, financing, or brokerage of housing, and provides, with respect to such practices, an enforcement machinery (42 U.S.C. sec. 3610). The section quoted above, however, refers to the Secretary's duties with respect to HUD's own programs and activities.

Read together, the Housing Act of 1949 and the Civil Rights Acts of 1968 show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight. In 1949 the Secretary, in examining whether a plan presented by a LP9 included a workable program for community improvement, could not act unconstitutionally, but possibly could act neutrally on the issue of racial segregation. By 1964 he was directed, when considering whether a program of community development was workable, to look at the effects of local planning action and to prevent discrimination in housing resulting from such action. In 1968 he was directed to act affirmatively to achieve fair housing. Whatever were the most significant features of a workable program for community improvement in 1949, by 1964 such a program had to be nondiscriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing.

The interrelationship of the Housing Act of 1949 and the 1964 Civil Rights Act is recognized in the regulations issued by HUD. 24 CFR 1.1–1.7. Those regulations do not apply to insurance or guaranty contracts, 24 CFR 1.3,[4] but they do apply to urban renewal programs under the Housing Act of 1949, and to "any assistance to any person who is the ultimate beneficiary under such program or activity" 24 CFR 1.3(3). Such persons include rent supplement beneficiaries. The regulations provide:

> A recipient,[5] in determining the *location or types* of *housing*, . . . *financial aid or other benefits* which will be provided under any such program or activity, or the class of persons to whom, or the situations in which, such housing, . . . financial aid, or other benefits will be provided . . . or the class of persons to be offered an opportunity to participate in any such program or activity, may not, directly or through contractual or other arrangements, utilize criteria

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[4] Although authority to issue mortgage insurance is unaffected by the Civil Rights Act of 1964, 42 U.S.C. 2000d–4, that exception has no bearing on the outcome of this case. The Federal assistance involved here is a combination of rent supplements and mortgage insurance. The rent supplement program comes within the terms of 42 U.S.C. 2000d, and is not excepted by 42 U.S.C. 2000d–4. Thus in passing on this version in the urban renewal plan, HUD was not entitled to overlook the prohibitions of the 1964 Civil Rights Act. Moreover, in the duties imposed on the Secretary by the Civil Rights Act of 1968, there is no distinction between mortgage insurance and other programs relating to housing and urban development. 42 U.S.C. 3608(d)(5).

[5] A "recipient" is not to be confused with an "ultimate beneficiary." Recipients include all political subdivisions, public agencies, organizations, institutions, or individuals to whom Federal financial assistance is extended, directly or through another recipient, for any program or activity, or who otherwise participates in carrying out such program or activity . . . (24 C.F.R. § 1.2(f)).

The LPA, whose actions are the focus of this case, is a recipient within this definition.

> or methods of administration *which have the effect of subjecting persons to discrimination because of their race . . . or have the effect of defeating or substantially impairing the objectives of the program or activity as respect persons of a particular race, color or national origin.* (24 CFR 1.4(b)(2)(i)). [Emphasis added.]

This regulation, issued on the authority of the Civil Rights Act of 1964, 42 U.S.C. 2000d–1, was in effect when "red line" approval for a change to a 221(d)(3) project was given in 1967 and when final approval of mortgage insurance and rent supplement assistance was given in 1968. The regulation marks a recognition by the agency charged with enforcement that the 1964 act must be read *in pari materia* with the other statutes dealing with housing and urban development. In particular, in adopting an "effects" test rather than an "intention" test for reviewing local actions respecting location of types of housing, the regulation recognizes that the 1964 act gave refined meaning to the requirement in the Housing Act of 1949 of a "workable program for community improvement." 42 U.S.C. 1451–(c). While no regulations have been issued under that part of the Civil Rights Act of 1968 applicable to the administration of HUD's own programs, 42 U.S.C. 3608(d)(5), that statute, too, must be read as a refinement of the "workable program for community improvement" requirement.

The issue then, is whether, when HUD approved a change from an urban renewal plan which contemplated substantial owner occupied dwellings to a plan which contemplated 221(d)(3) dwellings with rent supplement assistance, the procedures which it followed were in adequate compliance with the 1949 Housing Act and the 1964 and 1968 Civil Rights Acts.

The defendants challenge the standing of these plaintiffs to rise that issue. The district court held that they had the requisite standing. We agree.

The question of standing to challenge agency actions in the administration of the Federal Housing Act has arisen heretofore in the context of an agency's duty to require adequate relocation housing for minority group residents removed by virtue of site acquisition. *Norwalk CORE* v. *Norwalk Redevelopment Agency* (395 F.2d 920 (2d Cir. 1968)); *Powelton Civic Home Owners Ass'n.* v. *HUD* (284 F. Supp. 809 (E.D. Pa. 1968)); *Western Addition Community Organization* v. *Weaver* (294 F. Supp. 433, 441 (N.D. Cal. 1968)). Those cases recognized the standing to sue of members of the potentially displaced community. By virtue of the specific statutory provisions prohibiting grants or loans to a LPA in the absence of an adequate relocation program, 42 U.S.C. 1455(c), such persons are clearly within the zone of interests to be protected by the statute, cf. *Association of Data Processing Service Organizations, Inc.* v. *Camp* (397 U.S. 50 (1970)), and thus their standing is somewhat clearer than that of the instant plaintiffs. It has also been held that potential residents of federally assisted housing projects have standing to challenge agency decisions as to the site of those projects. *Hicks* v. *Weaver* (302 F. Supp. 619 (E.D. La. 1969)); *Gautreaux* v. *Chicago Housing Authority* (265 F. Supp. 582 (N.D. Ill. 1967)). In these cases, too, the potential residents, claiming discriminatory site selection, were within the zone of interests protected by the statute. In *North City Area-Wide Council, Inc.* v. *Romney* (428

F.2d 754 (3d Cir. 1970)), this court found that a citizens' group had standing to seek review of a change in citizen participation in the Model Cities program. There, too, it was rather clear that the protesting plaintiffs were within the zone of interests protected by the Model Cities statute, 42 U.S.C. 3301 et seq. The defendants point out that the instant plaintiffs are neither displaced residents nor potential occupants and that the HUD action which they challenge was not taken under the Model Cities statute. Such persons, they say, have too remote an interest to confer standing on them to challenge these administrative actions. We do not agree. Certainly the dispute which they seek to have adjudicated will be presented in an adversary context. *Flast* v. *Cohen* (392 U.S. 83, 101 (1968)). The test, for article III purposes, is whether or not plaintiffs allege injury in fact. They do indeed. They allege that the concentration of lower income black residents in a 221(d)(3) rent supplement project in their neighborhood will adversely affect not only their investments in homes and businesses, but even the very quality of their daily lives. They claim, moreover, that they have been aggrieved by agency action within the meaning of section 10(a) of the Administrative Procedure Act. 5 U.S.C. 702. Classes of persons deemed by the courts to be sufficiently aggrieved by agency action for standing to sue are expanding *Association of Data Processing Service Organizations, Inc.* v. *Camp, supra; Barlow* v. *Collins* (397 U.S. 159 (1970)); *Scenic Hudson Preservation Conf.* v. *FPC* (354 F.2d 608, 616 (2d Cir. 1965)); *Office of Communication of United Church of Christ* v. *FPC* (359 F.2d 994, 1000 (D.C. Cir. 1966)). The plaintiffs here, perhaps more than the displaced and relocated former residents or the potential occupants of new housing, are vitally affected by the adequacy of the particular program of community improvement for the preservation of a residential community with decent homes and a suitable living environment which they seek to challenge. 42 U.S.C. 1451(c).

But, say the defendants, even assuming standing in the article III sense and in the sense of 5 U.S.C. 702, this is a case of agency action committed to agency discretion by law. Neither in the Housing Act of 1949. 42 U.S.C. 1450 et seq., nor in the relevant provisions of the Housing Act of 1954, 12 U.S.C. 1715l, and the Housing and Urban Development Act of 1965, 12 U.S.C. 1701s, do we find language which expressly or by necessary implication would make unreviewable HUD's decision to permit modification of the East Poplar urban renewal plan by substituting a different type of housing than was contemplated in earlier versions of the plan. Congressional intent to commit agency action to unreviewable discretion must appear from "clear and convincing evidence." *Abbott Laboratories* v. *Gardner* (387 U.S. 136, 141 (1967)). There is no such evidence in the statutes under which HUD acted in this case. The district court concluded that some HUD decisions under the Housing Act of 1949 are reviewable. It said:

> We think it clear that we are empowered to review the agency's adherence to its own procedural requirements. *Thorpe* v. *Housing Authority of Durham* (393 U.S. 268 (1969)), particularly where, as here, the statutory requirement for a hearing from which HUD's red line standards are drawn, 42 U.S.C.A. 1455(d), is itself a mandatory requirement in every loan and grant contract. 42 U.S.C.A. 1455, see *Western Addition Community Organization* v.

> *Weaver* (294 F. Supp. 433, 422 (N.D. Calif. 1968)). Therefore, while we think it appropriate that HUD be given some discretion to implement the red line procedure, it seems clear that such discretion could not be beyond the reach of judicial review contemplated in the Administrative Procedure Act, 5 U.S.C.A. 706 . . . (305 F. Supp. at 214).

The district court then drew a distinction between the decision whether the proposed change qualified for "red line" treatment, and the decision whether a given "red line" change was acceptable from a planning viewpoint. The former decision, involving a determination that a proposed change was not a material alteration of the plan, was said to be reviewable. The latter, involving planning judgments, was said to be unreviewable. The district court then addressed itself to a determination of the basic elements of the fifth amendment to the East Poplar urban renewal plan.

HUD contended that land use controls are the determinative factors, and that the introduction of Fairmount Manor was not such a basic change in the land uses proposed. It defended its decision to grant "red line" approval for the project chiefly on the relatively minor changes which were required in the applicable zoning ordinances. Plaintiffs contend that a much more sophisticated judgment must be made and many factors besides land use must be taken into consideration in deciding if an urban renewal plan encompasses or is part of a workable program for community improvement. They contend that an essential part of the East Poplar plan was that resident home ownership would tend to create a more stable and racially balanced environment. They contend that the change to 221(d)(3) rent supplement housing introduced into a neighborhood in which there were already a large number of public low rent housing projects another project for the same socioeconomic group.

The district court found that some degree of sales housing was an element of the plan. It held, however, that approval of the change to 221(d)(3) rent supplement housing was one which HUD could, in its discretion, make as a "red line" change. The significance of this holding was that it approved a HUD procedure which eliminated the necessity for both a section 105(d) public hearing and a report on minority group considerations. It approved a procedure, in other words, which foreclosed any inquiry into the effect of the change in type of housing on racial concentration in the East Poplar area or in Philadelphia as a whole. By permitting HUD to concentrate on land use considerations it permitted that agency to disregard the fact that from a social standpoint a 221(d)(3) project with 100 percent rent supplement occupancy is the functional equivalent of a low rent public housing project.

The defendants assert that HUD has broad discretion to choose between alternative methods of achieving the national housing objectives set forth in the several applicable statutes. They argue that this broad discretion permitted HUD in this case to make an unreviewable choice betwen alternative types of housing. We agree that broad discretion may be exercised. But that discretion must be exercised within the framework of the national policy against discrimination in federally assisted housing, 42 U.S.C. 2000d, and in favor of fair housing. 42 U.S.C. 3601. When an administrative decision is made without consideration of relevant factors it must be set aside. *Scenic Hudson Preservation Conf.* v. *FPC*, *supra* at 612. Here the agency concentrated on land use factors and made no investigation or determination of the social factors involved in the choice of type of housing which it approved. Whether such exclusive concentration on land use factors was originally permitted under the Housing Act of 1949, since 1964 such limited consideration has been prohibited.

Oddly enough, HUD in its Low Rent Housing Manual recognizes that concentration of low rent public housing can have adverse social, and hence planning, consequences. Paragraph 4(g) of that manual provides:

> . . . [a]ny proposal to locate housing only in areas of racial concentration will be prima facie unacceptable and will be returned to the local authority for further consideration.

If there is a distinction between the effects of site selection of low rent public housing and of 221(a)(3) rent supplement housing, such distinction has not been developed in the record before us. No similar regulations applicable to 221(d)(3) projects or to the rent supplement program have been issued, though these programs, operating in conjunction, would seem to have the same potential for perpetuating racial segregation as the low rent public housing program has had. See *Gautreaux* v. *Chicago Housing Authority* (296 F. Supp. 907 (N.D. Ill. 1969)); *Hicks* v. *Weaver, supra.*

Defendants contend that the interests which plaintiffs seek to vindicate are adequately protected by the complaint and enforcement procedures of title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3610–3613, and title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1. They contend plaintiffs could have and did not exhaust enforcement remedies therein provided. We do not agree. Those sections of the 1968 act establish a complaint and enforcement procedure for the redress of discriminatory housing practices prohibited by sections 804, 805 and 806 of the act, 42 U.S.C. 3604, 3605, 3606. The complaint and enforcement procedures do not pertain to the Secretary's affirmative duties under section 808(d)(5) of the 1968 act, 42 U.S.C. 3608(d)(5), or under the 1964 Civil Rights Act, or under the Housing Act of 1949. As to these affirmative duties judicial review of his actions is available as outlined hereinabove. Similarly, the procedures afforded under the Civil Rights Act of 1964 are designed to provide redress against specific discriminatory acts, and do not pertain to the adequacy of HUD procedures.

Finally, defendants contend that there was no evidence in the record below of discriminatory site selection in the location of rent supplement projects. The district court found:

> What proof there is on this question shows without dispute that rent subsidy housing is evenly and well disbursed within the city as well as without, in both ghetto and nonghetto areas. (305 F. Supp. at 225).

Leaving to one side the plaintiffs' contention that this finding goes beyond the proof and is in any event the result of the district court's circumscription of evidence on that point, we think the finding is irrelevant. Congress has since 1949 refined its view of the factors relevant to achieving national housing objectives. At least under the 1968 Civil Rights Act, and probably under the 1964 Civil Rights Act as well, more is required of HUD than a determination that some rent supplement housing is located outside ghetto areas. Even though previously located rent supplement projects were located in nonghetto areas the choice of location of a given project could have the "effect of subjecting persons to discrimination because of their race . . . or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity as respect persons of a particular race. . . ." 24 CFR 1.4(b)(2)(i). That effect could arise by virtue of the undue concentration of persons of a given race, or socioeconomic group, in a given neighborhood. That effect could be felt not only by occupants of rent supplement housing and low cost housing, but by occupants of owner occupied dwellings, merchants, and institutions in the neighborhood. Possibly before 1964 the administrators of the Federal housing programs could, by concentrating on land use controls, building code enforcement, and physical conditions of buildings, remain blind to the very real effect that racial concentration has had in the development of urban blight. Today such color blindness is impermissible. Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy. Approval of Fairmount Manor under the "red line" procedure produced a decision which failed to consider that policy.

The only institutionalized methods which have been called to our attention by which HUD can obtain the information necessary to make an informed decision on the effects of site selection or type selection of housing on racial concentration are the public hearings specified by section 105(d) of the 1949 act and the Report on Minority Group Considerations (R–215) required by the Urban Renewal Handbook as a part of a project application. A public hearing at the local level would be an obvious means for obtaining the relevant information. We do not now hold that such a public hearing is the only acceptable means. A requirement for a report from the applicant, such as the Report on Minority Group Considerations (R–215), may be an acceptable alternative. The Agency, with its own expertise, may find an alternative preferable to either. We hold, however, that the Agency must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socioeconomic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts.

Plaintiffs urge that some sort of adversary hearing or at least an opportunity for residents in the area to be heard should be required. They rely on the district court decision in *Powelton Civic Homeowners Ass'n. v. HUD, supra.* Without suggesting how this court would rule on the *Powelton* situation, we think a case involving the adequacy of relocation procedures which are dealt with specifically in the Housing Act of 1949, 42 U.S.C. 1455(c), is distinguishable from the more general problem of racial concentration presented here. In this case the judgment to be made by HUD is quasi-legislative. So long as it adopts some adequate institutional means for marshaling the appropriate legislative facts, the rights of affected residents will be adequately protected, we think by the opportunity to obtain judicial review pursuant to the Administrative Procedure Act after the Agency decision. For deliberately discriminatory action by a LPA there are other adversary type remedies available, 41 U.S.C. 3610 et seq., 42 U.S.C. 2000d–1; 24 CFR 1.7(b).

The report on minority group considerations (R. 215) as specified in the Urban Renewal Manual which was in effect at the time of the agency action here challenged is not in our judgment adequate to the purpose.[6] It is apparently required only if the project will result in a substantial net reduction in supply of housing in the project area available to racial minority families. That is obviously a consideration, but it is not enough. The effect of a substantial net increase in racial minority families in the area as a result of the project is an equally obvious consideration. Without in any way attempting to limit the agency in the exercise of its own administrative expertise, we suggest that some consideration relevant to a proper determination by HUD include the following:

1. What procedures were used by the LPA in considering the effects on racial concentration when it made a choice of site or of type of housing?[7]
2. What tenant selection methods will be employed with respect to the proposed project?
3. How has the LPA or the local governing body historically reacted to proposals for low-income housing outside areas of racial concentration?
4. Where is low-income housing, both public and publicly assisted, now located in the geographic area of the LPA?
5. Where is middle income and luxury housing, in particular middle income and luxury housing with Federal mortgage insurance guarantees, located in the geographic area of the LPA?
6. Are some low-income housing projects in the geographic area of the LPA occupied primarily by tenants of one race, and if so, where are they located?
7. What is the projected racial composition of tenants of the proposed project?
8. Will the project house school age children and if so what schools will they attend and what is the racial balance in those schools?
9. Have the zoning and other land use regulations of the local governing body in the geographic area of the LPA had the effect of confining low-income housing to certain areas, and if so how has this affected racial concentration?
10. Are there alternative available sites?
11. At the site selected by the LPA how severe is the need for restoration, and are other alternative means of restoration available which would have preferable effects on racial concentration in that area?

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[6] The requirements for the Report on Minority Group Considerations now specified in the Urban Renewal Manual are far more extensive, requiring a statement on the expected effect on racial concentration. RHA 7207.1, ch. 5, § 2.

[7] C., *El Cortez Heights Residents and Property Owners Ass'n* v. *Tucson Housing Auth.*, 10 Ariz. App. 132, 457 P.2d 297 (1969).

The foregoing considerations are confined to the geographic area served by the LPA. We do not suggest that by so confining our lists we would restrict HUD to a review of factors operating only within such geographic area. The time may come when, in order to achieve the goals of the national housing policy, HUD will have to take steps to overcome the effects of contrasts in urban and suburban land use regulations. What those steps should be we do not here suggest.

Nor are we suggesting that desegregation of housing is the only goal of the national housing policy. There will be instances where a pressing case may be made for the rebuilding of a racial ghetto. We hold only that the agency's judgment must be an informed one: one which weighs the alternatives and finds that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration.

Thus the district court judgment dismissing the complaint must be reversed. This brings us to a consideration of possible remedies. The defendants suggest that because the project has been completed and occupied by rent supplement tenants there is no longer any relief which may feasibly be given. The completion of the project and the creation of intervening rights of third parties does indeed present a serious problem of equitable remedies. It does not, however, make the case moot in the article III sense. Relief can be given in some form. For example, the court could order that the project mortgage not be guaranteed under section 221(d)(3) and that it be sold to a private profit-making owner. It could order that the project continue in nonprofit ownership as a 221(d)(3) project, but that the rent supplement tenants be gradually phased out and replaced with market rental tenants. Since the disposition which we propose to make will require a remand to the district court and then to the administrative agency, it may well be that no equitable relief at all will in the end be required. This suit for an injunction and for declaratory relief will have been no less appropriate a means for obtaining judicial review even if that should prove to be the case.

The final order of the district court will be vacated and the cause remanded to the district court for the entry of an injunctive order prohibiting further steps in the finalization of mortgage insurance or other Federal financial assistance to the project until such time as HUD makes a determination in substantive and procedural conformance with this opinion as to whether the location of a 221(d)(3) project with 100 percent rent supplement occupancy will enhance or impede a workable program for community improvement in conformity with the Civil Rights Acts of 1964 and 1968. That order should impose an appropriate time limit for such determination. Because of the intervening rights of tenants and others not before the court the order need not in the interim require termination of rent supplement payments. The HUD determination shall be reviewable by the district court which at that time may make an appropriate final order.

SASSO *v.* UNION CITY

424 F.2d 291 (9th Cir. 1970)

AFFIRMED—MARCH 16, 1970

Action by Spanish-speaking organization for injunctive action directing city to implement zoning change permitting construction of federally financed housing project for low- and moderate-income families, notwithstanding citywide referendum nullifying rezoning ordinance. The U.S. District Court for the Northern District of California, William T. Sweigert, J., denied motion for three-judge court and preliminary injunction and plaintiff appealed. The Court of Appeals, Merrill, circuit judge, held that contention that purpose and result of citywide referendum was to discriminate racially and economically against Mexican-American residents and that result was to perpetuate discrimination within city against Mexican-American residents with low incomes did not require convening of three-judge court since validity of State law was not drawn in question and challenge was directed not against State's grant of power but against manner in which city had exercised power, notwithstanding that State statute provided for referendum.

Richard F. Bellman and Lewis M. Steel, New York City, Johnathan Rutledge, D'Army Bailey, Cruz Reynoso, San Francisco, Calif., Sol Rabken and Robert Carter, New York City, for *appellants.*

John V. Trump, of Bell, Trump, Sheppard & Raymond, Fremont, Calif., for *appellees.*

Anthony J. Garcia, San Leandro, Calif., and Pete Tijerina, Mario Obledo, San Antonio, Tex., for Mexican-American Defense and Education Fund, Farber & McKelvey, Seymor Farber and Edwin Lukas, San Francisco, Calif., for American Jewish Congress and American Jewish Committee, *amicus curiae.*

Before MERRILL and KOELSCH, circuit judges, and TAYLOR, district judge.*

MERRILL, circuit judge:

The principal appellant, the Southern Alameda Spanish Speaking Organization (SASSO), was successful in obtaining the passage of a city ordinance rezoning a tract of land within Union City, Calif., to a multifamily residential category in order to permit the construction of a federally financed housing project for low- and moderate-income families. The ordinance was nullified almost immediately by a citywide referendum. By this action appellants attack the referendum[1] and its results as infringing upon their constitutional rights under the due process and equal protection clauses of the 14th amendment, and seek injunctive action directing Union City to implement the zoning change notwithstanding the referendum.

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* Honorable Fred M. Taylor, United States District Judge for the District of Idaho, sitting by designation.

In the district court appellants sought, under 28 U.S.C 2281,[2] an order convening a three-judge court to entertain their constitutional claims. They also moved for a preliminary injunction directing Union City to put the zoning changes into effect pendente lite. The district court ruled against the appellants on both motions and that order is the subject of this appeal.

As incorporated in 1959, Union City combined two existing communities, known as, Decoto and Alvarado. The area was largely agricultural and the two communities were inhabited almost exclusively by Mexican-American residents.

Since incorporation Union City has absorbed residents both from Oakland to the north and San Jose to the south. The population has risen from about 6,600 in 1960 to the current 14,000. During the same period the composition of the population has also changed; the Mexican-American percentage has declined from 55 percent to about 35 to 40 percent of the total.

A master plan for Union City was formally adopted in 1962, after public hearings. Under that plan, vacant land not then in use was generally zoned as agricultural, a "holding" classification subject to rezoning by city ordinance for urban use at the appropriate time. The plan did, however, anticipate future use and zoning. The land here in question (the "Baker Road tract") was zoned agricultural under the plan but designated for purposes of rezoning as appropriate for single-family dwellings.

Since 1962, suburban pressures have created an increasing need for multifamily housing in Union City and several such units have already been accommodated through rezoning ordinances. These units have largely gone to meet the needs of new residents. The old residents of Decoto and Alvarado, due to limited incomes, have been unable to enjoy the housing so provided, and have had to remain in those districts, where a substantial portion of the housing is rated substandard. In 1967, city officials concerned with housing problems contracted with a consulting firm for a comprehensive study of local housing requirements. That study, still incomplete, has resulted in a number of recommendations and a draft master plan. The firm recommended that the city encourage housing projects for families with low and moderate incomes, sponsored by nonprofit corporations and financed through Federal aid. The projected master plan designates the tract in question for multifamily dwellings. Although the 1962 plan has not been formally superseded, city officials have in large part accepted the firm's recommendations. They have informally abandoned the 1962 plan's designations of appropriate future use in favor of the updated designations regarded as more appropriate in light of the city's growth.

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[1] The original complaint was filed prior to the holding of the referendum and sought to enjoin the referendum itself. When appellants failed to secure that injunction, an amended and supplementary complaint was filed asserting the claims now presented.

[2] 28 U.S.C. § 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute, or of an order made by an administrative board or commission acting under State statute, shall not be granted by any district court or judge thereof, upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Appellant SASSO is qualified to sponsor federally assisted housing developments for low-income persons and was organized for the purpose of improving housing and living conditions for the Spanish-speaking people of southern Alameda County. In December 1968, it obtained an option to purchase the Baker Road tract, where it planned to construct a 280-unit medium density housing project. In accordance with this objective, SASSO applied to the city planning staff of Union City for rezoning. After appropriate studies, the planning staff recommended the application to the planning commission. Several months later the planning commission's recommendation for rezoning (medium density multifamily residential) was approved by the city council after public hearings; an ordinance was passed on April 7, 1969.

The Baker Road tract is adjacent to several tracts of single-family homes. Opposition to the April 7 ordinance arose there and among other homeowners; petitions seeking a referendum under section 4051, California Elections Code,[3] were circulated and completed. Pursuant to section 4052, California Elections Code,[4] the matter was submitted to the voters of Union City, who by a vote of 1,149 to 845 rejected the ordinance. The referendum automatically restored the Baker Road tract to the agricultural holding category and the city council was barred from rezoning the tract for medium density, multi-residential dwellings for a period of 1 year.

I—POLICE POWER AND DUE PROCESS

Appellants initially challenge the constitutionality of California's referendum procedures as applied to the zoning process. They contend that "referendum zoning" violates due process requirements.

The rights asserted are those of a landowner (SASSO)[5] to be free from arbitrary restrictions on land use. Appellants assert that regulation of land use by zoning is constitutionally permissible only where procedural safeguards assure that the resulting limitations have been determined, by legislatively promulgated standards, to be in the interest of public health, safety, morals, or the general welfare. They contend that the referendum process destroys the necessary procedural safeguards upon which a municiality's power to zone is based and subjects zoning decisions to the bias, caprice and self-interest of the voter. They rely on *Washington ex rel. Seattle Title Trust Co.* v. *Roberge* (278 U.S. 116, 49 S. Ct. 50 73, L. Ed. 210 (1928)), and *Eubank* v. *City of Richmond* (226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912)).

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[3] § 4051. Cal. Elections Codes, provides:

"If a petition protesting against the adoption of an ordinance is . . . submitted to the clerk of the legislative body of the city within 30 days of the adoption of the ordinance and is signed by not less than 10 percent of the voters of the city . . . the effective date of the ordinance shall be suspended, and the legislative body shall reconsider the ordinance."

[4] § 4052, Cal. Elections Code, provides:

"If the legislative body does not entirely repeal the ordinance against which the petition is filed, the legislative body shall submit the ordinance to the voters, either at a regular municipal election . . . or at a special election . . . . The ordinance shall not become effective until a majority of the voters voting on the ordinance vote in favor of it. If the legislative body repeals the ordinance or submits the ordinance to the voters and a majority of the voters voting on the ordinance do not vote in favor of it, the ordinance shall not again be enacted by the legislative body for a period of one year after the date of its repeal by the legislative body or disapproval by the voters."

[5] SASSO at the time held an option to purchase the Baker Road tract, for which it had paid $6,000, subject to forfeit.

Appellants' reliance on these cases is misplaced. There, local ordinances permitted residents of a neighborhood, by majority vote (*Eubank*) or by withholding consent (*Washington*), to impose restrictions that otherwise had not legislatively been determined to be in the public interest. The resulting rule, as applied to appellants' contentions respecting procedural safeguards, would seem to be that an expression of neighborhood preference for restraints, uncontrolled by any legislative responsibility to apply acceptable public interest standards, is not such a determination of what is in the public interest as will justify an exercise of the police power to zone.

A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest. See *Spaulding* v. *Blair* (403 F. 2d 862 (4th Cir. 1968)). This question lay at the heart of the proposition put to the voters. That some voters individually may have failed to meet their responsibilities as legislators to vote wisely and unselfishly cannot alter the result.

Nor can it be said that the resulting legislation on its face was so unrelated to acceptable public interest standards as to constitute an arbitrary or unreasonable exercise of the police power. See *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, *supra*; *Eubank* v. *City of Richmond*, *supra*; *Euclid, Ohio* v. *Ambler Realty Co.* (272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926)). Many environmental and social values are involved in a determination of how land would best be used in the public interest. The choice of the voters of Union City is not lacking in support in this regard.

Thus in the present case neither the zoning process itself nor the result can be said to be such an arbitrary or unreasonable exercise of the zoning power as to be violative of appellants' right to due process of law. We agree with the district court that no substantial constitutional question was presented by appellants' due process contentions, and that they warranted neither a three-judge court[6] nor a preliminary injunction.[7]

Appellants contend that both the purpose and the result of the referendum were to discriminate racially and economically against the Mexican American residents of Union City. They assert that the referendum was racially motivated and that its result was to perpetrate discrimination in Union City against Mexican American residents with low incomes.

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[6] In so ruling on the substantiality of the constitutional challenge to the California statute, we avoid considering whether the other prerequisites for three-judge court jurisdiction under 28 U.S.C. § 2281 are satisfied. See note 2, *supra*.

[7] We note that on similar facts the 6th Circuit through somewhat different reasoning reached the same result. Ranjel v. City of Lansing, 417 F.2d. 321 324 (6th Cir. 1969), cert. denied, 397 U.S. 980, 90 S.Ct. 1105, 25 L.Ed.2d 390 (1970).

Under the facts of this case we do not believe that the question of motivation for the referendum (apart from a consideration of its effects) is an appropriate one for judicial inquiry. In this respect, *Reitman* v. *Mulkey* (387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967)), is distinguishable.

There a constitutional amendment, adopted by the people of California through a statewide ballot, resulted in the repeal of existing fair housing laws and prohibited all legislative action abridging the rights of persons to sell, lease or rent property to whomsoever they chose. In examining the constitutionality of the amendment, its purpose was treated as a relevant consideration.

Purpose was judged, however, in terms of ultimate effect and historical context. The only existing restrictions on dealings in land (and thus the obvious target of the amendment) were those prohibiting private discrimination. The only "conceivable" purpose, judged by wholly objective standards, was to restore the right to discriminate and protect it against future legislative limitation. The amendment was held to constitute impermissible State involvement (in the nature of authorization or encouragement) with private racial discrimination (387 U.S. at 381, 87 S. Ct. 1627).

The case before us is quite different. As we have noted, many environmental and social values are involved in determination of land use. As the district court noted,

> . . . [T]here is no more reason to find that [rejection of rezoning] was done on the ground of invidious racial discrimination any more than on perfectly legitimate environmental grounds which are always and necessarily involved in zoning issues.

If the voters' purpose is to be found here, then, it would seem to require far more than a simple application of objective standards. If the true motive is to be ascertained not through speculation but through a probing of the private attitudes of the voters, the inquiry would entail an intolerable invasion of the privacy that must protect an exercise of the franchise. *Spaulding* v. *Blair*, *supra*.

Appellants' equal protection contentions, however, reach beyond purpose. They assert that the effect of the referendum is to deny decent housing and an integrated environment to low-income residents of Union City. If, apart from voter motive, the result of this zoning by referendum is discriminatory in this fashion, in our view a substantial constitutional question is presented.

Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits. Given the recognized importance of equal opportunities in housing,[8] it may well be, as matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families, who usually—if not always—are members of minority groups.[9] It may be, as a matter of fact, that Union City's plan, as it has emerged from the referendum, fails in this respect. These issues remain to be resolved.

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[8] See Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); Reitman v. Mulkey, *supra*; Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921).

They do not, however, call for a three-judge court under 28 U.S.C. section 2281. It is not State law that has brought about the condition in Union City and the validity of State law is not drawn in question. State law has enabled Union City to act, but appellants' challenge is directed not against the State's grant of power but against the manner in which the city has exercised that power.[10]

Nor do we feel that denial of preliminary injunction constituted abuse of discretion. An injunction here would not serve to freeze the status quo but would require that affirmative steps now be taken in the direction of the ultimate remedy sought by appellants. The fact that discrimination resulted from the referendum, and that Union City has failed to make satisfactory provision for low-income housing, is not so clear as to demand preliminary relief of this nature.

The order of the district court is affirmed.

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[9] In Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968), the 2d Circuit has endorsed this broader view of equal portection within a housing context. That case held that plaintiffs had a cause of action even where there was no showing of discrimination in housing opportunities [failure to relocate persons displaced by urban renewal projects] brought about by public officials. *Id.* at 932. As the court there stated:

"The fact that the discrimintaion is not inherent in the administration of the program . . . surely does not excuse the planners from making sure that there is available relocation housing for all displacees. 'Equal protection of the laws' means more than merely the absence of governmental action designed to discriminate; as Judge J. Skelley Wright has said, 'we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and public interest as the perversity of a willful scheme.' Hobson v. Hansen, 269 F.Supp. 401, 497 (D.D.C. 1967)." 395 F.2d at 931.

[10] For the same reason, discriminatory purpose similar to that found in Reitman v. Mulkey, *supra*, would present no three-judge issue.

CORE *v.* NORWALK REDEVELOPMENT AGENCY

395 F.2d 920 (2d Cir. 1968)

APPEAL

FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

ARGUED JANUARY 10, 1968—DECIDED JUNE 7, 1968

JUDGMENT REVERSED AND REMANDED

HAYS, circuit judge, *dissented.*

Jonathan W. Lubell, New York City (Lubell and Lubell, New York City, Stephen L. Fine, Westport, Conn. and Dennis J. Roberts, Newark, N.J., on the brief), for *appellants.*

Vincent D. Flaherty, Norwalk, Conn., for *appellee* Norwalk Redevelopment Agency.

Thomas A. Flaherty, South Norwalk, Conn., for *appellee* city of Norwalk.

Terrence J. Murphy, Jr., Norwalk, Conn., for *appellee* Norwalk Housing Agency.

Robert A. Slavitt, Norwalk, Conn., for *appellees* Towne House Gardens, Inc. and David Katz & Sons, Inc.

Michael C. Farrar, attorney, Department of Justice, Washington, D.C. (Edwin L. Weisl, Jr., Assistant Attorney General, Alan S. Rosenthal, attorney, Department of Justice, and Jon O. Newman, U.S. attorney, Hartford, Conn., on the brief), for *appellees* Robert C. Weaver, and Charles J. Horan.

Donald Holtman, Simsbury, Conn., for Connecticut Civil Liberties Union, *amicus curiae.*

Robert L. Carter and Lewis M. Steel, New York City, for National Association for the Advancement of Colored People, *amicus curiae.*

Joseph B. Robison, Sol Rabkin and Bertram S. Halberstadt, New York City, for National Committee Against Discrimination in Housing, *amicus curiae.*

Before SMITH, KAUFMAN, and HAYS, circuit judges.

J. JOSEPH SMITH, circuit judge:

This appeal raises timely and fundamental questions regarding the availability of the Federal courts to persons who, displaced by urban renewal programs, claim that they have been deprived of the equal protection of the laws in connection with Government efforts to assure their relocation, and that such relocation efforts have not been adequate under the mandate of a Federal statute. The plaintiffs' complaint, which attempted to raise these two issues, was dismissed by the District Court for the District of Connecticut. *Norwalk CORE* v. *Norwalk Redevelopment Agency* (42 F.R.D. 617 (1967)). We hold that the district court was in error, and remand for further proceedings not inconsistent with this opinion.

The program involved here is being carried out in the city of Norwalk, Conn., and is designated South Norwalk Renewal Project No. 1 (Project No. Conn. R–34). (Hereinafter "the project.") The project plan was approved by the Common Council of Norwalk (the city's legislative body) on August 28, 1962, and on June 24, 1963, the Norwalk Redevelopment Agency ("the agency") entered into a loan and capital grant contract ("the contract") with the Housing and Home Finance Agency (now the Department of Housing and Urban Development, "HUD") under the Housing Acts of 1949 and 1954 ("the act"); 63 Stat. 413 (1949), as amended, 42 U.S.C. 1441–1460 (Supp. 1967); and 68 Stat. 590 (1954), as amended 42 U.S.C. 1446–1460 (Supp. 1967).[1]

Pursuant to section 105(c) of the act, 42 U.S.C. 1455(c), the contract required that the agency provide, in the urban renewal area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities, decent, safe, and sanitary dwellings within the financial means of the families displaced by the project, equal in number to the number of displaced families, available to them, and reasonably accessible to their places of employment.

The plaintiffs are the Norwalk, Conn., chapter of the Congress of Racial Equality, two nonprofit tenants' associations comprised of low-income Negroes and Puerto Ricans, and eight individuals representing four classes of low-income Negroes and Puerto Ricans who were allegedly subjected to discrimination in connection with the project.[2] They brought this class action in June 1967, against the Norwalk Housing Authority, its executive director and its members; the Norwalk Redevelopment Agency, its administrator and its members; the city of Norwalk, its mayor and city clerk; Towne House Gardens, Inc.; David Katz & Sons, Inc.; Charles J. Horan, Assistant Regional Administrator for Renewal Assistance of the U.S. Department of Housing and Urban Development; and Robert C. Weaver, Secretary of the U.S. Department of Housing and Urban Development.[3]

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[1] The functions of the Housing and Home Finance Agency were transferred to the Secretary of Housing and Urban Development by section 5 of the Department of Housing and Urban Development Act, 79 Stat. 669 (1965), as amended, 42 U.S.C. § 3534 (Supp.1967). See also 81 Stat. 17 (1967). We will use the initials HUD throughout this opinion to refer to both the Department of Housing and Urban Development and its predecessor, the Housing and Home Finance Agency.

[2] The four classes are: (1) those still occupying homes within the project area; (2) those whose homes in the project area have been demolished, and who now occupy "overcrowded" rental units outside of the project area but within the City of Norwalk; (3) those whose homes in the project area have been demolished, and who now occupy rental units "at excesive rentals" outside of the project area but within the City of Norwalk; and (4) those who formerly lived in Norwalk, but "by virtue of the acts of defendants" complained of, now occupy rental units outside of the City. It is alleged that each class is too numerous to make it practicable to bring all of its members before the Court, that each will be fairly and adequately represented by those plaintiffs who are members of it, that there are common questions of law and fact affecting the rights of all members of each class, and that as to each a common relief is sought.

The Spring Street Tenants Association is composed of low income Negroes who formerly lived in the project area, and who, it is alleged, have not been relocated into decent and proper housing at rentals within their financial means and reasonably accessible to their places of employment. The Day Street-Washington Village Tenants Association is composed of low-income Negroes and Puerto Ricans living outside the project area, allegedly in "unsafe and indecent housing beyond their financial means."

Since the action was dismissed, the allegations of the complaint, summarized in the following paragraphs, must be accepted as true.

The agency made its redevlopment plans without providing for the construction of low-rent housing on the ground that the existing low-rent public housing in the city, with its predicted turnover, would adequately meet the relocation needs of the low-income Negro and Puerto Rican families living within the project area. Prior to the time when it entered into the contract, however, the agency knew:

> 1. That its turnover figures were exaggerated, arrived at so as to present apparent facilities for relocation;
> 2. That there was a long waiting list for low-rent public housing in the city, substantially all Negro and Puerto Rican families and that any plan giving priority to families from the project area in the public housing would impair the housing opportunities of the Negroes and Puerto Ricans on the waiting list; and
> 3. That there was discrimination against Negroes and Puerto Ricans in the private housing market in the city.

Thereafter, the agency learned from reports by the Commission on Civil Rights of the State of Connecticut and by the agency's "relocation experts," Urban Dynamics Consultants, that vacancies in housing projects in the city were running less than one-half of the predicted number, that the housing authority received an average of over 300 applications per year for public housing units, and that discrimination in rentals in the private or open market was rampant, rentals to Negro and Puerto Rican families averaging twice as much as that charged to white families for comparable housing. The annual report of the city's department of health for the year 1964 stated that families formerly living in the project area were being crowded into already overcrowded homes, and that multiple-dwelling units were being created from homes which were barely adequate for one family. The agency knew, plaintiffs allege, that Negro and Puerto Rican families were being subjected to such hardships and deprivations in connection with relocation (not experienced to any substantially equal degree by white families in the city) that many were being forced to leave the city entirely, but it continued, nonetheless, to demolish the homes of low-income Negro and Puerto Rican families in the project area and continued to make additions and revisions in its plans without making any provision for the construction of low-rent housing to be made available to the Negro and Puerto Rican families being relocated. The agency also entered into a contract with defendant, Towne House, in May 1967 for the sale of a 6-acre parcel of land in the project area to be used for 90 units of moderate-income housing at rentals beyond the financial means of the Negro and Puerto Rican families being displaced, and that parcel is the only plot of land owned by the city which is currently available for the construction of low-income housing.

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[3] Where it is necessary to distinguish among the defendants, we will call Horan and Weaver the "federal defendants," Towne House Gardens, Inc. and David Katz & Sons, Inc. the "private defendants," and the remaining defendants the "local defendants." Towne House is described in the complaint as a Connecticut corporation to which the City and the Agency have agreed to sell six acres of land in the project area; David Katz & Sons, Inc. is described as a Connecticut corporation, the sponsor of the project, the owner and/or operator of the largest number of apartments and apartment structures in the City, and the owner of one-half of the stock of Towne House.

Despite the requests of various groups and citizens of the city, including some of the plaintiffs, HUD has refused to require the construction of low-cost housing, and has approved the sale of the 6-acre parcel. "Further recourse to HUD would be futile." [4]

The complaint goes on to allege that the homes of various of the plaintiffs and other Negro and Puerto Rican families and individuals have been demolished, that some of them have been moved to rental units within the project area on a temporary basis, and that the city and agency have:

> . . . pursued a course of conduct to force the said Negro and Puerto Rican families out of the onsite housing structures by rendering such housing unsafe, unsanitary, and indecent, by charging rents beyond the financial means of the families and individuals, by forcing excessive moving of families and individuals from one onsite location to another . . . and by carrying on heavy construction activities around the said onsite houses."

Some of the displaced Negro and Puerto Rican families have been compelled to move into overcrowded housing, some into housing at rentals substantially in excess of their financial means, and some into housing outside of the city.

The plaintiffs make three claims based upon the foregoing allegations:

> 1. That they and those whom they represent have been denied the equal protection of the laws guaranteed by the 14th amendment and by the laws of the United States;
>
> 2. That the local defendants have intended to deprive low-income Negro and Puerto Rican families of the equal protection of the laws, and have intended to force such families out of the city; and
>
> 3. That the defendants have acted in violation of section 105(c) of the act.

Plaintiffs' prayer for relief included requests that the agency and city, and Towne House and Katz, be enjoined from transferring or encumbering the 6-acre parcel, that the agency be enjoined from demolishing any residential structure within the project area until the residents have been relocated into safe and decent housing at rentals they can afford, and that the district court require the agency, city, and authority to proceed "with all deliberate speed," under the supervision of the court, to propose a plan for and to construct low-income housing units on the 6-acre parcel.

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[4] Nothing we say in this opinion precludes defendants from trying to show to the District Court's satisfaction that plaintiffs have failed to take advantage of available administrative remedies.

The essential ground upon which the district court dismissed the complaint was that both the association and individual plaintiffs "have no standing to challenge the official conduct here in question" (42 F.R.D. at 622). The district court also held that the action was not a proper class action under rule 23 (F. R. Civ. P.).

The court took into account that the relief asked for in the complaint was in its view inappropriate, but we are not sure of the extent to which this underlay its decision. The opinion concluded that "It is the use of [the] 6-acre tract for moderate-income housing rather than low-income rental units that forms the basis of the instant action," (42 F.R.D. at 619). This characterization of the action in terms of the prayer for relief was, in a sense, correct, for the complaint summarized the action as one for an injunction restraining the defendants from proceeding with the sale of the 6-acre parcel and directing them to build low-rent housing on the parcel, and for an injunction restraining the defendants from evicting families living in the project area until all of the families were permanently relocated in housing within their financial means. Nevertheless, if the complaint was dismissed on the basis that the relief requested was inappropriate, or beyond the court's power to grant, the court moved too quickly. Rule 54(c) (F.R. C.P.), states in relevant part that:

> Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

When a motion to dismiss a complaint is made this rule is read in conjunction with rules 8, 12, and 15, and its clear and long-accepted meaning is that a complaint should not be dismissed for legal insufficiency except where there is a failure to state a claim on which some relief, not limited by the request in the complaint, can be granted.[5]

We hold that the allegations of this complaint state constitutional and statutory claims on which relief can be granted, that the individual plaintiffs have standing to make the claims, and that this action was appropriately brought as a class action. We turn first to the issues presented by plaintiffs' constitutional claim.

I

The plaintiffs contend that they were denied the equal protection of the laws when the defendants acted, knowingly and deliberately, so as to compound the problem of racial discrimination in the Norwalk housing market, with the inevitable and intended result that some Negroes and Puerto Ricans would be forced to leave the city altogether.[6]

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[5] 6 Moore's Federal Practice ¶ 54.60 (2d ed. 1966) and cases there cited; 2A Moore's Federal Practice ¶ 12.08; see also A. T. Brod & Co. v. Perlow, 375 F.2d 393, 398 (2 Cir. 1967).

[6] The complaint asserts that the jurisdiction of the District Court is based upon 28 U.S.C. § 1343(3) and (4); and 42 U.S.C. §§ 1981, 1982, 1983 and 1988. Additionally, it is alleged that the matter in controversy exceeds the sum of $10,000, and that there is jurisdiction under 28 U.S.C. § 1331. The complaint was not dismissed for want of jurisdiction, and none of the defendants has contended before us that jurisdiction is wanting. It is clear that the District Court has subject matter jurisdiction.

The district court never reached the merits of this claim, for it concluded that:

> Members of the public, whether living inside or outside a project area, ordinarily have no standing to challenge planning of an urban renewal project . . . nor, by alleging civil rights violations, do they gain standing they would otherwise not have [citing cases]. If residents of a project area cannot challenge a project while it is in the planning stages and before construction has begun, certainly they can have no standing to assert the same kind of challenge at a time when planning has been implemented, most of the land has been purchased and conveyed to developers, and construction of new buildings has been almost completed.

42 F.R.D. at 622.[7] It is true that courts have been reluctant to interfere with urban renewal planning. The fact that the reasons for this reluctance have been lumped together under the rubric of "lack of standing to sue" should not be allowed to obscure the distinction, necessary albeit not altogether clear between the propriety of allowing particular plaintiffs to bring litigation—their standing to sue—and the propriety of judicial attempts to resolve the problem which the plaintiffs are attempting to bring before the court (the question of justiciability.) [8]

We consider first the issue of standing. The courts will not, it is clear, entertain a suit by one who does not have some personal stake in the outcome of the litigation. See *Baker* v. *Carr* (369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962))) ; *Stark* v. *Wickard* (321 U.S. 288, 304, 64 S.Ct. 559, 88 L.Ed. 733 (1944)) : cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath* (341 U.S. 123, 151, 71 S.Ct. 624, 95 L.Ed. 817 (1951)) (opinion of Mr. Justice Frankfurter). In *Frothingham* v. *Mellon* (262 U.S. 447, 486–89, 43 S.Ct. 597, 67 L.Ed. 1078 (1923)), the Supreme Court refused to allow a Federal taxpayer to challenge the constitutionality of a Federal statute where the plaintiff's claimed interest in the outcome was simply that "the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law" (262 U.S. at 486, 43 S.Ct. at 600). The burden of future taxation was held to be essentially a matter of public, not individual, concern.

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[7] The District Court did not distinguish the issue of plaintiff's standing to raise their equal protection claim from that of plaintiffs' standing to seek judicial review of action which the federal defendants have taken under section 105(c) of the Act. Given the allegations of the complaint, its holding necessarily covered both issues. Insofar as the question of standing relates to the personal stake which plaintiffs have in the outcome of the litigation, the issues are the same. But the question whether the constitutional right which plaintiffs are claiming is one which the courts will protect must be considered separately from the question whether the courts will ever review the administrative action which is challenged. Where such review is not available, the situation is usually characterized as "lack of standing." The question of standing to seek judicial review of the administrative action is the subject of part II of this opinion.

[8] On the unclear distinction between standing and justiciability, see note 13 infra. Our discussion of "standing" in this part of the opinion is limited to the standing of the individual plaintiffs. We consider the standing of the association plaintiffs separately in part III.

Even where a plaintiff has a personal stake in the outcome of a case, he may be denied standing to sue on the ground that the right which he is attempting to assert is not one which the courts will recognize. Thus, one cannot as a general matter object to governmental action on the basis that it aids one's competitors, for it is said that no legal wrong results from lawful competition. *Alabama Power Co.* v. *Ickes* (302 U.S. 464, 468–469, 58 S.Ct. 300, 82 L.Ed. 374 (1938)); *Kansas City Power & Light Company* v. *McKay* (96 U.S. App. D.C. 273, 225 F.2d 924, cert. denied 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955)).[9] This court has, accordingly, refused to grant standing to plaintiffs who object to urban renewal planning on this basis. *Taft Hotel Corp.* v. *Housing and Home Finance Agency* (262 F.2d 307 (2 Cir. 1968)), cert. denied 359 U.S. 967, 79 S.Ct. 880, 3 L.Ed. 2d 835 (1959)); *Berry* v. *Housing and Home Finance Agency* (340 F.2d 939 (2 Cir. 1965)).

Harrison-Halsted Community Group, Inc. v *Housing and Home Finance Agency* (310 F.2d 99 (7 Cir. 1962), cert. denied 373 U.S. 914, 83 S.Ct. 1297, 10 L.Ed. 2d 414 (1963)), relied on by the district court, is similar to *Taft* and *Berry*. Plaintiffs there sought to bar the acquisition and clearing, under an urban renewal program, of an area in Chicago for the use of the University of Illinois. They alleged that they would suffer economic injury if the plan were carried out, and that some of them had relied on past promises and representations of Government officials in connection with previously announced plans for residential and commercial development in the area. The court held that it did not appear that any of the plaintiffs' "private legal rights" had been violated.[10]

The plaintiffs in the case before us are in a very different position. Their stake in the outcome of the case is immediate and personal, and the right which they allege has been violated—the right not to be subjected to racial discrimination in Government programs—is one which the courts will protect. Their standing to sue is clear. *Cf. Nashville I-40 Steering Committee* v. *Ellington* (387 F. 2d 179 (6 Cir. 1967), cert. denied 390 U.S. 921, 88 S.Ct. 857, 19 L.Ed. 2d 982 (1968)).

The district court opinion also raised, at least by implication, the question of justiciability. Holding that the plaintiffs could not "gain standing they would otherwise not have" by alleging "civil rights violations," the Court cited *Green Street Association* v. *Daley* (373 F. 2d 1 (7 Cir.), cert. denied 387 U.S. 932, 87 S.Ct. 2054, 18 L.Ed. 2d 995 (1967)).[11] The complaint in *Green Street* alleged, *inter alia*, that the urban renewal project which the plaintiffs were attempting to bring before the court was not undertaken in good faith, but was a

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[9] One may, of course, have standing based on competitive interests where it is provided by statute. See F. C. C. v. Sanders Brothers Radio Station, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869 (1940), and see part II of this opinion, infra.

[10] The main question in *Harrison-Halsted* was whether the plaintiffs had a right to judicial review of administrative action taken under the Housing Act of 1949. See part II, infra.

[11] The Court also cited Johnson v. Redevelopment Agency of the City of Oakland, California, 317 F.2d 872 (9 Cir.), cert. denied 375 U.S. 915, 84 S.Ct. 216, 11 L.Ed.2d 154 (1963), on this issue. While violation of the Fifth and Fourteenth Amendments was alleged in that case, upon appeal the issues had narrowed to whether or not the defendant had formulated and was carrying out a feasible plan of relocation as required by section 105(c) of the Act.

"deliberate plan to create a no-Negro 'buffer zone' between [a] shopping area and [a] surrounding residential community so that the shopping area [would] be more attractive to white customers . . . ," and that the plan proposed "relocation of the residents in the cleared area in accordance with segregated housing patterns . . ." (373 F. 2d at 4).

The seventh circuit characterized the first count of the complaint, which attempted to raise constitutional issues as to the reasons for which the plan was undertaken, as "an attempt to obtain Federal judicial review of a program of urban renewal prior to the exercise of the power of eminent domain" (373 F. 2d at 6). It held that cases presenting such challenges are matters for condemnation proceedings in the State courts if the taking is ostensibly for a public purpose, and that only in exceptional cases such as *Progress Dev. Corp.* v. *Mitchell* (286 F. 2d 222 (7 Cir. 1961)),[12] "where the facts alleged indicate to all outward appearances that the taking is designed solely to deny constitutional rights, is the power of eminent domain subject to the prior scrutiny of the Federal courts" (373 F. 2d at 7).

The fourth count of the complaint in *Green Street* dealt with the alleged deficiencies in the relocation program. Claims were made under section 105 of the Housing Act of 1949 (42 U.S.C. 1455(c)), section 601 of the Civil Rights Act of 1964 (42 U.S.C. sec. 2000d), and the equal protection clause of the 14th amendment. The court discussed the issue of standing to sue under the two statutes, but not standing to raise the equal protection claim.

The seventh circuit thus did not say that the *Green Street* plaintiffs lacked standing to raise their constitutional claims. Much of what the court said about the first count of the complaint, however, implies that it harbored some doubt as to the justiciability of the issues which the plaintiffs were attempting to raise in that count. It was a concern for "the practical and efficient administration of urban renewal programs" (373 F. 2d at 5), and a reluctance to inquire into the subjective reasons of the legislative authority seeking to acquire the land in question, id. at 6, which underlay the court's refusal to review the urban renewal program prior to the exercise of the power of eminent domain.[13] The holding reached was narrow, however: that the issues should be raised, if at all, in State court condemnation proceedings.

It was contended at oral argument in this case that plaintiffs' constitutional claim is nonjusticiable; in particular, that cases such as this one cannot be heard without involving the courts in overall urban renewal planning, and thus in the resolution of questions which are ultimately political. We need not concern ourselves with the problem raised by the first count of the complaint in *Green Street:* the justiciability of a challenge to the basic validity of an urban renewal program, on the ground that the program as a whole, is intended to achieve or perpetuate racial segregation.[14] Plaintiffs here complain that they were denied the equal protection of the laws in the planning and implementation of the relocation program, and this, at least, is a justiciable claim. (The seventh circuit agrees, for it reached the merits of the constitutional issues raised by the fourth count of the complaint in *Green Street.*)

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[12] In *Progress*, the plaintiffs were subdivision developers who had announced their intention to sell some of the houses they proposed to construct to Negroes. The complaint alleged, *inter alia*, that the defendants were abusing their power to condemn land and to enforce local building ordinances so as to discriminate against plaintiffs because of their announced intention to sell to Negroes. The Seventh Circuit, characterizing the case as one concerning "the corporate right to engage in business and make a profit," 286 F.2d at 234, held that the District Court had "erred in granting summary judgment [for defendants] on the complaint." Ibid.

[13] Similar concerns underlay the decision in *Harrison-Halstead*, *supra*. "Lack of standing" and "want of justiciability" (or, in different words, the presence of a "political question") are doctrines serving the same general purpose of assuring that the courts pass only on questions which are raised in actual cases or controversies and which are ripe and appropriate for judicial determination. They are, therefore, doctrines between which no clear distinction is generally found. See Bickel, The Least Dangerous Branch, 125–126 (1962) and Note, 77 Yale L.J. 966, 976–987 (1968).

We cannot doubt the necessity of discretionary decisionmaking in urban renewal planning. This necessity would render unfit for judicial decision many questions concerning urban renewal. See *Baker* v. *Carr* (369 U.S. 186, 217, 82 S.Ct. 691, 7 L. Ed. 2d 663 (1962)); cf. *Berman* v. *Parker* (348 U.S. 26, 33, 75 S.Ct. 98, 99 L. Ed. 27 (1954)). This does not mean, however, that every case or controversy touching this area lies beyond judicial cognizance. Case-by-case inquiry is necessary, with due regard for the need for judicially discoverable and manageable standards for resolving problems to be undertaken, and with recognition to the role played by the coordinate branches of the Federal Government in the planning and implementation of urban renewal. See *Baker* v. *Carr, supra* (369 U.S. at 208–217, 82 S.Ct. at 691).

The extent to which relocation of those displaced by urban renewal is required will necessarily affect the pace at which urban renewal can take place, and the priority of goals in urban renewal planning. Issues are at stake which are, in the truest sense of the word, political. For example, if public housing were required to be available for every displacee of urban renewal, then it would follow, at least in the present condition of the Nation's cities, that the building of public housing would be assigned very high priority. The standard for relocation is thus appropriately set by the legislative and executive branches of Government, and not by the courts. Congress has provided, in section 105(c) of the act, that the standard for relocation is "decent, safe, and sanitary dwellings" in the urban renewal area or in other areas not generally less desirable, within the financial means of the families displaced. The executive branch (HUD) is entrusted with the primary responsibility for enforcing this standard.

The basic constitutional claim raised by the allegations of the complaint, as we understand it, is that in Norwalk this standard was less sufficiently met in the relocation of Negroes and Puerto Ricans than in the relocation of whites. We need not consider the political question of the adequacy of the standard to conclude, as we have for reasons set out below, that proof of these allegations would make out a case of violation of the equal protection clause, and we see no reason to believe that the courts are incapable of fashioning remedies to insure that the standard is equally met for all citizens. With this case only at the pleadings stage, we do not think that we should speculate on what specific remedies might be appropriate if the plaintiff's allegations are proved. As a general matter, the most appropriate form of judicial relief in cases such as this would be to require proof that the relocation standard is being met in general as adequately for nonwhites as it is for whites before allowing the project to go forward. An affirmative form of relief, such as an order requiring the construction of low-income housing, would of course be much less appropriate, since it would necessarily involve the court in areas foreign to its experience and competence.

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[14] We note that an overall challenge of this type was considered on the merits in Nashville I–40 Steering Committee v. Ellington, 387 Fd.2d 179 (6 Cir. 1967), cert. denied 390 U.S. 921, 87 S.Ct. 2054, 18 L.Ed.2d 995 (1968).

If the defendants' argument is that requiring that the relocation standard be met equally for all displacees, nonwhite as well as white, will result in delays in the implementation of some urban renewal programs, the answer is that such delays would be due to the standard, rather than its equal implementation for all. Whether or not such delays must be prevented is much more in the nature of a political question than is the constitutional issue which plaintiffs are attempting to raise.

Nothing we have said so far would require considering plaintiffs' constitutional claims, of course, if the complaint did not allege a deprivation of equal protection of the laws, in violation of the 14th amendment.[15] As we read the district court's opinion, it was held below, on the authority of *Green Street*, supra, that no such deprivation was alleged.[16]

One of the allegations in *Green Street*, as we have noted above, was that the relocation provisions of the urban renewal plan expressly acknowledged the existence of a segregated residential pattern in the city of Chicago, and it was contended that implementation of these provisions was in violation of the plaintiffs' rights to equal protection of the laws. With respect to this, the court said:

> The existing "segregated" residential pattern is accidental to the plan. The city admittedly could not require relocation in any particular area; it may only determine what housing is available in fact and offer whatever assistance it can in furnishing this information to displacees. The local defendants may not be enjoined from proceeding with the plan simply because the plan fails to include what the local defendants would be powerless to enforce—"integrated" relocation.

(373 F. 2d at 9.) Similarly, the district court in the case before us said that the defendants' relocation program "is designed to prevent displacees from suffering any consequences or change in circumstances, if and when they are relocated into the discriminatory housing market. They cannot owe a greater duty to end a situation which is merely 'accidental' to the plan" (42 F.R.D. at 623).

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[15] U.S.Const. amend. XIV; § 1: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."

[16] The opinion below could be read as holding only that plaintiffs had no standing to challenge administrative action under the Housing Act of 1949, and that the Civil Rights Act of 1964 conferred no standing privileges on plaintiffs. See 42 F.R.D. at 622–623. But the complaint clearly raised an equal protection claim against the local and private defendants, the jurisdiction of the court was properly alleged (see note 6, supra), and we must read the opinion as having passed on the equal protection claims.

We do not understand plaintiffs' constitutional argument to be that defendants must end discrimination in the Norwalk open housing market through the relocation plan, or even that defendants must find integrated housing for those displaced by the project. Those are arguments we need not consider until they are appropriately put to us.

What plaintiffs' complaint alleges, in substance, is that in planning and implementing the project, the local defendants did not assure, or even attempt to assure, relocation for Negro and Puerto Rican displacees in compliance with the contract to the same extent as they did for whites; indeed, they intended through the combination of the project and the rampant discrimination in rentals in the Norwalk housing market to drive many Negroes and Puerto Ricans out of the city of Norwalk. The argument is that proof of these allegations would make out a case of violation of the equal protection clause. We agree.

Section 105(c) of the act provides that contracts for loans or capital grants entered into under the act shall require the availability or the provision of relocation housing for displacees which meets the standard set out in that section. That standard is designed, as the district court recognized, to prevent displacees from suffering a change for the worse in their living conditions. It is no secret that in the present state of our society discrimination in the housing market means that a change for the worse is generally more likely for members of minority races than for other displacees.[17] This means that in many cases the relocation standard will be easier to meet for white than for nonwhite displacees.[18] But the fact that the discrimination is not inherent in the administration of the program, but is, in the words of the district court, "accidental to the plan," surely does not excuse the planners from making sure that there is available relocation housing for all displacees. "Equal protection of the laws" means more than merely the absence of governmental action designed to discriminate: as Judge J. Skelly Wright has said, "we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." *Hobson* v. *Hansen* (269 F. Supp. 401, 497 (D.D.C. 1967)).[19]

Since the plaintiffs are admittedly displaced as a result of the project, there is no question of the presence of "State action" within the meaning of the 14th amendment. Where the relocation standard set by Congress is met for those who have access to any housing in the community which they can afford, but not for those who, by reason of their race, are denied free access to housing they can afford and must pay more for what they can get, the State action affirms the discrimination in the housing market. This is not "equal protection of the laws." [20]

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[17] See, e.g., U.S. Advisory Commission on Intergovernmental Relations, Relocation: Unequal Treatment of People and Businesses Displaced by Governments (1965); and Hartman, The Housing of Relocated Families, 30 J.Am.Inst.Planners 266, 273–274 (1964).

[18] We wish to stress that the specific problem is not that non-white displacees are, on the average, poorer than white displacees. That may be so, but it is a more general problem. What we are concerned with is that discrimination which forecloses much of the housing market to some racial groups, thereby driving up the price they must pay for housing. The situation is made worse by the fact that most people displaced by urban renewal are non-white. See Note, 77 Yale L.J. 966, 967 (1968).

[19] See generally Black, Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv.L.Rev. 69 (1967).

What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.[21] Where it is drawn for the purpose of achieving equality it will be allowed,[22] and to the extent it is necessary to avoid unequal treatment by race, it will be required.[23]

We hold that plaintiffs' complaint alleges a denial of the equal protection of the laws, and that the district court should have proceeded to consider that claim on its merits.

II

The plaintiff's statutory claim is that the Federal and local defendants have violated section 105(c) of the act (42 U.S.C., sec. 1455(c) (Supp. 1967)).[24] The district court concluded that plaintiffs lacked standing to raise this issue. Since the section requires provision for the relocation of displaced families, it can hardly be thought that displaced families such as plaintiffs, do not have the required personal stake in the outcome of litigation where a violation of the section is claimed. If anybody can raise this claim, it is these plaintiffs. The question we must answer is whether actions taken by HUD and local public agencies under section 105(c) are ever subject to judicial review.

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[20] We need not consider whether the state has so involved itself in acts of private discrimination in the housing market as to make those otherwise private acts "state action." See Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); cf. Jones v. Alfred H. Mayer Company, 379 F.2d 33 (8 Cir.), cert. granted 389 U.S. 968, 88 S.Ct. 479, 19 L.Ed.2d 459 (1967) (No. 645).

[21] See, e. g., Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92, L.Ed. 1161 (1947); Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958).

[22] Offerman v. Nitkowski, 378 F.2d 22 (2 Cir. 1967); Springfield School Committee v. Barksdale, 348 F.2d 261, 266 (1 Cir. 1965).

[23] United States v. Jefferson County Board of Education, 380 F.2d 385, 386 (5 Cir., en banc, 1967), affirming 372 F.2d 836 (5 Cir. 1966), cert. denied Bd. of Education of the City of Bessemer v. United States, 389 U.S. 840, 88 S.Ct. 77, 19 L.Ed.2d 104.

[24] Section 105 provides, in relevant part: "Contracts for loans or capital grants shall be made only with a duly authorized local public agency and shall require that—

* * * * * * *

(c)(1) There shall be a feasible method for the temporary relocation of individuals and families displaced from the urban renewal area, and there are or are being provided, in the urban renewal area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the individuals and families displaced from the urban renewal area, decent, safe, and sanitary dwellings equal in number to the number of and available to such displaced individuals and families and reasonably accessible to their places of employment. . . .

The section's coverage was extended to displaced individuals by the Housing and Urban Development Act of 1965, and that extension does not apply to this project. See section 305(c) of that Act, 79 Stat. 476 (1965). So far as now appears, the plaintiffs all represent displaced families.

The proposition is now firmly established that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner* (387 U.C. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed. 2d 681 (1967)).[25] We have concluded that plaintiffs are aggrieved, and that there is no persuasive reason to believe that Congress intended to cut off judicial review.

The defendants maintain that plaintiffs cannot obtain judicial review of action under section 105(c) unless they can show that Congress, in enacting that section, intended to confer upon them a "legal right" to protection. A "legal right" to protection means, in the abstract, nothing at all. The specific and practical question here is whether or not plaintiffs may seek enforcement of the section, and the cases make it clear that the answer turns on whether Congress' purpose in enacting it was to protect their interests. *Hardin* v. *Kentucky Utilities Company* (390 U.S. 1, 5–7, 88 S. Ct. 651, 19 L.Ed. 2d 787 (1968)); *Chicago Junction Case* (264 U.S. 258; 44 S.Ct. 317, 68 L.Ed. 667 (1924)).[26] That was precisely Congress' purpose, as the legislative history of the act clearly indicates:

> The bill sets up adequate safeguards against any undue hardship resulting from the undertaking of slum clearance under current conditions. It requires, first, that no slum-clearance project shall be undertaken by a local public agency unless there is a feasible means for the temporary relocation of the families to be displaced, and unless adequate permanent housing is available or is being made available to them.[27]

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[25] See also Cappadora v. Celebrezze, 356 F.2d 1, 6 (2 Cir. 1966); 4 Davis, Administrative Law Treatise § 28.21 (1965 Supp.); Jaffe, Judicial Control of Administrative Action, 372–374 (1965).

As the Supreme Court said in Abbott Laboratories v. Gardner, the Administrative Procedure Act, 5 U.S.C. §§ 701–706, under which plaintiffs here seek judicial review, reinforced the early cases in which judicial review of administrative action was entertained. See 387 U.S. at 140, 87 S.Ct. 1507.

5 U.S.C. § 701 provides that "This chapter applies . . . except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." There is no need for us to consider whether these exceptions apply only where Congress' intent in the matter is explicit, for we discern no Congressional intent, implied or explicit, to preclude review or to commit determinations under section 105(c) to HUD's absolute discretion. See Davis, "Judicial Control of Administrative Action": A Review, 66 Colum.L.Rev. 635, 651–652 (1966). The Supreme Court, by framing the test as "persuasive reason to believe that such was the purpose of Congress," appears to say that the intent may be implied. 387 U.S. at 140, 87 S.Ct. at 151.

[26] The Administrative Procedure Act, 5 U.S.C. § 702 provides that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." We do not think that this language is to be construed as limiting judicial review to those situations where Congress has explicitly referred to persons "adversely affected" or "aggrieved" by agency action. That would not be a "hospitable" interpretation of the Act's "generous" review provisions. Abbott Laboratories v. Gardner, 387 U.S. at 140–141, 87 S.Ct. at 1507. We will, in accordance with what the Supreme Court has said in Hardin v. Kentucky Utilities Company, supra, consider any person attempting to assert an interest, personal to him, which the "relevant statute" was specifically designed to protect, and which he claims is not being protected, as "adversely affected or aggrieved" within the meaning of that statute.

[27] S.Rep. No. 84, 81st Cong., 1st Sess., in U.S.Code Cong.Serv. (1949) pp. 1550, 1564.

Congress was deeply concerned that slum conditions be eliminated, not merely displaced to grow up elsewhere. The Senate report stated, in words which have when read today a somewhat prophetic ring:

> Approximately one out of every five of our urban families is living today under slum conditions which, in turn, are the breeding ground for disease, juvenile delinquency, and crime. Your committee is convinced that the Nation cannot and should not tolerate indefinitely the social costs resulting from the impact of these conditions.[28]

The relocation requirements of section 105(c) were not enough, of course, to ensure the elimination of slum conditions, and Congress recognized this fact.[29] But they were designed to work toward that end by guaranteeing that, in clearing slum areas, Government would not be driving into still worse conditions the people who lived in those areas. As the Senate committee put it, the bill set up adequate safeguards against any undue hardship.

It has been suggested to us that since section 105(c) only provides that the relocation requirements be included in loan or capital grant contracts, the requirements are merely contract rights possessed by the Federal Government, which cannot be enforced by displaces. This is a proposition we cannot accept, for much more is involved here than a narrow issue of contract rights. As we have already said, the fact that Congress intended to protect the specific interests of displacees when it enacted the section is enough to give the displacees standing, in the absence of a persuasive reason to believe that Congress intended to cut off judicial review. Judicial review obtains not only to advance what have traditionally been viewed as "legal rights," but also to vindicate the public interest,[30] and Congress has made clear its view that adequate relocation is in the public interest. That Congress provided for enforcement of the relocation provisions through contracts with the local agencies does not weaken the appropriateness of judicial review, for such a method of enforcement is natural where Congress is specifying what requirements local agencies must meet in order to receive Federal aid. The possibility that an administrative agency, charged with enforcing a requirement established by Congress in the public interest, will not adequately perform the task is equally great whether enforcement is through contract or through direct regulation. Accordingly, the reasons for allowing those who have a direct, personal interest in furthering the congressional purpose to seek judicial review of administrative action are as compelling in one situation as in the other.

We have found no reason to believe that Congress intended to cut off judicial review under the act. Nothing in the act or its legislative history indicates such an intent,[31] and we do not think that it can be inferred from the nature of the subject with which the acts deals. The defendants have argued that urban renewal does not readily lend itself to judicial review, and, in the words of the Supreme Court in *Perkins* v. *Lukens Steel Co.*, (310 U.S. 113, 131–132, 60 S.Ct. 869, 1879, 84 L.Ed. 1108 (1940)), that:

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[28] Id. at p. 1560.

[29] See id. at 1561; and see generally Note, Judicial Review of Displacee Relocation in Urban Renewal, 77 Yale L.J. 966 (1968).

[30] See Scenic Hudson Preservation Conference v. F. P. C., 354 F.2d 608, 615–617 (2 Cir. 1965), cert. denied Consolidated Edison Co. of New York, Inc. v. Scenic Hudson Preservation Conference, 384 U.S. 941, 86 S.Ct. 1462, 16 L.Ed.2d 540 (1966); Office of Communication of United Church of Christ v. F. C. C., 359 F.2d 994, 1000–1006 (D.C.Cir. 1966). See generally Reich, The Law of the Planned Society, 75 Yale L.J. 1227 (1966).

> The interference of the courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief . . .

We have already indicated in part I of this opinion our general views on the appropriate scope of judicial review in this area. We are not subjecting to judicial scrutiny the planning of urban renewal programs, see *Berman* v. *Parker* (348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954)), nor are we considering the adequacy of the relocation standard set by Congress.[32] The judicial review which we make available to the displacees in this case is entirely different from the sweeping judicial action sought by the respondents in *Perkins*, who could point to no statute enacted for their protection and giving them standing. (See especially 310 U.S. at 126–127, 60 S.Ct. at 869.)

Since this case has not advanced past the pleadings stage, and there is nothing before us to indicate what efforts HUD has made to require relocation in compliance with the standard of section 105 (c), or what the plaintiffs claim HUD should have done, it would be a mistake for us to attempt at this time to state specifically what we would expect of HUD in this respect.[33]

The defendants have relied heavily in their briefs and oral argument upon *Johnson* v. *Redevelopment Agency of the City of Oakland, California* (317 F.2d 872 (9 Cir.), cert. denied 375 U.S. 915, 84 S.Ct. 216, 11 L. Ed. 2d 154 (1963)), and *Green Street Association* v. *Daley*, (373 F.2d 1 (7 Cir.), cert. denied 387 U.S. 932, 87 S.Ct. 2054, 18 L. Ed. 2d 995 (1967)). We decline to follow those cases to the extent they are inconsistent with what we have said here.

The Seventh Circuit held in *Green Street* [34] that the plaintiffs there had no standing to claim that relocation provisions were inadequate under section 105(c), relying entirely on its decision in *Harrison-Halsted Community Group, Inc.* v. *Housing and Home Finance Agency* (310 F.2d 99 (7 Cir. 1962)), cert. denied 373 U.S. 914, 83 S.Ct. 1297, 10 L.Ed.2d 414 (1963). The plaintiffs in *Harrison-Halsted* objected to certain land use decisions in an urban renewal project. They claimed that they had standing to seek judicial review of actions of the Housing and Home Finance Agency (predecessor of HUD) because they would suffer economic injury as a result of those actions. The court's conclusion that the interest asserted was not sufficient to support standing was based on a long line of cases holding that injury through economic competition is generally not a sufficient basis for standing to sue.[35] But none of those cases supports a holding that displacees have no standing to seek judicial review of agency action under section 105(c). It has always been held that a competitive interest of the kind asserted in those cases is sufficient to support standing where the statute, under which the action sought to be reviewed has been taken, in one intended to protect that interest.[36] The interest which displacees have in being relocated in decent, safe and sanitary housing in no less important than any other interest, "competitive" or otherwise, which has been given statutory protection. Since Congress specifically intended to protect the displacees' interest in adequate relocation, the displacees have standing.

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[31] It has been pointed out that where Congress intends that administrative determinations under the Act may be unreviewable, it has said so explicitly: under section 114 of the Act, added in 1964, 78 Stat. 788–90, as amended 42 U.S.C. § 1465(e) (Supp. 1967), determinations with regard to relocation assistance payments may be made unreviewable. Note, 77 Yale L.J. 966, 972 n. 28 (1968).

[32] See text following note 14, supra.

[33] The provisions of the Administrative Procedure Act on scope of judicial review are set out in 5 U.S.C. § 706. We note that the plaintiffs are requesting review of a substantive determination, rather than of the procedures followed by HUD in making the determination sought to be reviewed.

[34] We have discussed other aspects of the *Green Street* decision in part I of this opinion.

It has been suggested that *Johnson* v. *Redevelopment Agency of the City of Oakland*, *California*, *supra*, need not be read to preclude altogether judicial review of agency action under 105(c).[37] We think that a fair reading of the opinion in that case indicates that the ninth circuit viewed Congress' decision to incorporate relocation requirements in contracts with the local agencies as precluding judicial review. (See 317 F.2d at 874.) We have already given our reasons for rejecting that view.[38]

The approach we have taken is consistent with our decision in *Gart* v. *Cole*, (263 F.2d 244 (2 Cir.), cert. denied 359 U.S. 978, 79 S.Ct. 898, 3 L.Ed.2d 929 (1959)). The appellants in that case claimed standing to assert violations of the Housing Act's alleged requirement of open bidding on all property sold as part of the project involved. We concluded that the sections allegedly establishing the requirements were "designed to protect not the interests of landowners or tenants in a redevelopment area, but those of the public at large," and we held, on the basis of familiar authority already discussed in this opinion, that the appellants could not challenge an expenditure of funds "as representatives of so broad an interest," (263 F.2d at 250). We went on to hold that the plaintiffs did have standing to challenge a refusal to grant them an oral hearing on the feasibility of the project's relocation plan, and to claim that the administrator had improperly delegated his duty to review the feasibility of the project's relocation provisions. Our inquiry there, as here, was explicitly whether the relevant statutory provisions were designed to protect the interests which the plaintiffs were asserting.[39] (See 263 F.2d at 251.) The defendants have argued that *Gart* v. *Cole* should be distinguished as involving procedural claims, rather than substantive ones. Although the scope of judicial review of substantive questions may differ from the scope of review where procedural questions are at issue, this does not make *Gart* v. *Cole* irrelevant. The question before us is standing, not the ultimate scope of review.

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[35] Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1938); Berry v. Housing and Home Finance Agency, 340 F.2d 939 (2 Cir. 1965); Taft Hotel Corp. v. Housing and Home Finance Agency, 262 F.2d 307 (2 Cir. 1958), cert. denied 359 U.S. 967, 79 S.Ct. 880, 3 L.Ed.2d 835 (1959); Pennsylvania Railroad Company v. Dillon, 335 F.2d 292 (D.C.Cir.), cert. denied American-Hawaiian S. S. Co. v. Dillon, 379 U.S. 945, 85 S.Ct. 437, 13 L.Ed. 2d 543 (1964); Allied-City Wide v. Cole, 97 U.S.App. D.C. 277, 230 F.2d 827 (1956); Kansas City Power & Light Company v. McKay, 96 U.S.App.D.C. 273, 225 F.2d 924, cert. denied 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955); Pittsburgh Hotels Association, Inc. v. Urban Redevelopment Authority of Pittsburgh, 309 F.2d 186 (3 Cir. 1962), cert. denied Hilton Hotels Corp. v. Urban Redevelopment Authority of Pittsburgh, 372 U.S. 916, 83 S.Ct. 730, 9 L.Ed.2d 723 (1963). Defendants have relied upon some of these cases in their briefs, pointing to language suggesting that the availability of judicial review turns upon the presence of Congressional intent to bestow a "legal right" to protection, or, in other cases, upon the invasion of a "legally protected right." The results reached in there cases are entirely consistent with the result reached here.

[36] Hardin v. Kentucky Utilities Company, supra; *Chicago Junction Case*, supra.

[37] Note, 73 Yale L.J. 1080 (1964).

[38] The opinion in Johnson makes reference to Hunter v. City of New York, 121 N.Y.2d 841 (Sup.Ct.1953). We read that case as holding that state courts have no jurisdiction to review the actions of agencies of the federal government.

We hold, then, that judicial review of agency action under section 105(c) of the act is available to displacees.[40] This does not mean, of course, that the courts are to intervene in relocation activities at the behest of every displacee disappointed in his relocation. Familiar doctrines limit the occasions on which particular judicial remedies, if any, are appropriate. In determining whether there has been compliance with section 105(c) of the act, courts will evaluate agency efforts and success at relocation with a realistic awareness of the problems facing urban renewal programs. Objections by individual displacees based on too literal an interpretation of the act's standards could unnecessarily interfere with programs of benefit to the entire community.

III

The district court held that this suit could not properly be brought as a class action under rule 23 of the Federal rules because there were no questions of law or fact common to the class or classes which the plaintiffs claim to represent. We think that the district court erred in reading the complaint as requesting ultimately that the court concern itself with the particular circumstances of each displacee's relocation.[41]

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[39] Cf. Merge v. Sharott, 341 F.2d 989 (3 Cir. 1965).

[40] The plaintiffs contend that section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, is an independent basis on which they have standing to sue. That contention presents a question which we do not think we should decide at this stage of this case. We do not read the section to set forth requirements differing from what is required of the states by the Fourteenth Amendment, and thus the plaintiffs need not rely on the section to assert their claims of discrimination against the local defendants or to obtain relief against them. Since we do not know what the plaintiffs would have the District Court require of the federal defendants, we do not know whether section 601 is relevant so far as the federal defendants are concerned. The framework of sections 601–605 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d–4, indicates that those sections are intended to assign to federal agencies an independent responsibility to bar discrimination in federally assisted programs.

We note that in Bossier Parish School Board v. Lemon, 370 F.2d 847 (5 Cir.), cert. denied 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967), where it was held that the plaintiffs had standing to sue under section 601, the defendants contended that the Fourteenth Amendment was inapplicable because the school children being segregated were "federal children." But cf. Gautreaux v. Chicago Housing Authority, 265 F.Supp. 582 (N. D.Ill., 1967).

[41] The local defendants assert in their brief that it was held in Cypress v. Newport News General and Nonsectarian Hospital Association, 375 F.2d 648,

The complaint alleges both that Negroes and Puerto Ricans were discriminated against in connection with relocation and that the relocation standards of section 105(c) were generally not met for Negro and Puerto Rican displacees. These allegations clearly raise questions of fact common to the class which plaintiffs represent. The fact that some members of the class were personally satisfied with the defendants' relocation efforts is irrelevant. (*Cf. Potts* v. *Flax*, 313 F.2d 284, 288–289 (5 Cir. 1963).)[42]

The association plaintiffs were denied standing below because they are "not themselves members of the classes whose rights they claim to be asserting." 42 F.R.D. at 622. We think that the reasons for requiring an individual plaintiff in a class action to be a member of the class do not necessarily preclude an association from representing a class where its raison d'etre is to represent the interests of that class. We do not decide, however, whether the association plaintiffs have standing. The answer to that question depends on whether there is a compelling need to grant them standing in order that the constitutional rights of persons not immediately before the court might be vindicated. See *NAACP* v. *State of Alabama, ex rel. Patterson*, (357 U.S. 449, 458–460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).[43] It appears to us that the individual plaintiffs can adequately represent the interests of all members of the relevant class, but we will not preclude the plaintiffs from trying to show to the district court's satisfaction that it is only the association plaintiffs which can perform this function.

Judgment reversed.

Remanded for further proceedings not inconsistent with this opinion.

HAYS, Circuit Judge (dissenting):

I would affirm the determination of the district court.

The issues which the plaintiffs offer are not justiciable and the remedies they seek are not within the power of the court to grant. (See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 131–132, 60 S.Ct. 869, 879,

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653 (4 Cir. 1967), that unless abuse is shown the trial court's decision as to whether or not a proper class action has been brought is final. The Fourth Circuit said nothing of the kind in that case. The Court was addressing itself specifically to the question whether the number of members of the class was sufficiently large to meet the requirement of Rule 23(a)(1) that the class be so numerous that joinder of all members is impracticable. That is a question of fact which the court naturally held to be within the competence of the District Court to determine. It is alleged in this case that the class is sufficiently numerous, and the District Court did not find otherwise.

[42] We further hold that the requirements of Rule 23(b) have been met. The District Court concluded that Rule 23(b)(2) was not satisfied because the specific relief requested by the plaintiffs was not, in its view, appropriate. We have already given our reasons for holding that the court is not limited to granting the relief requested, and it appears to us that final injunctive or declaratory relief with respect to the class as a whole would be appropriate if the allegations of the complaint are proved.

[43] We reject the local defendants' contention that an association cannot represent the rights of its members unless the interests of the association itself are involved. In NAACP v. State of Alabama, ex rel. Patterson, the Supreme Court specifically referred to the likelihood that the association itself would be adversely affected as a "further factor" pointing towards the holding of standing. 357 U.S. at 459–60, 78 S.Ct. at 1163.

84 L.Ed. 1108 (1940) ("The interference of the courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief," quoting *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 516, 10 L.Ed. 559 (1840)); *Berman* v. *Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954) ("We do not sit to determine whether a particular housing project is or is not desirable").)

The holding that plaintiffs do not have standing to bring the action is another formulation of the same principles. See *Green Street Association* v. *Daley* (373 F.2d 1 (7th Cir.), cert. denied, 387 U.S. 932, 87 S.Ct. 2054, 18 L.Ed.2d 995 (1967)); *Berry* v. *Housing and Home Finance Agency*, (340 F.2d 939 (2d Cir. 1965) (per curiam)); *Johnson* v. *Redevelopment Agency*, (317 F.2d 872 (9th Cir.), cert. denied, 375 U.S. 915, 84 S.Ct. 216, 11 L.Ed.2d 154 (1963)); *Pittsburgh Hotels Association* v. *Urban Redevelopment Authority* (309 F.2d 186 (3d Cir. 1962), cert. denied sub. nom.) *Hilton Hotels Corp.* v. *Urban Redevelopment Authority* (372 U.S. 916, 83 S.Ct. 730, 9 L.Ed.2d 723 (1963)); *Taft Hotel Corp.* v. *Housing and Home Finance Agency*, (262 F.2d 307 (2d Cir. 1958) (per curiam), cert. denied, 359 U.S. 967, 79 S.Ct. 880, 3 L.Ed.2d 835 (1959)); *Allied-City Wide, Inc.* v. *Cole*, (97 U.S. App.D.C. 277, 230 F.2d 827 (1956) (per curiam)).

The Federal courts cannot administer the housing program.

JAMES *v.* VALTIERRA

402 U.S. 137 (1971)

APPEAL

FROM THE U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

APRIL 26, 1971

OPINION OF THE COURT

Mr. Justice BLACK delivered the opinion of the Court.

These cases raise but a single issue. It grows out of the United States Housing Act of 1937, 42 U.S.C. 1401 et seq., which established a Federal housing agency authorized to make loans and grants to State agencies for slum clearance and low-rent housing projects. In response, the California Legislature created in each county and city a public housing authority to take advantage of the financing made available by the Federal Housing Act. See California Health and Safety Code section 34240. At the time the Federal legislation was passed the California constitution had for many years reserved to the State's people the power to initiate legislation and to reject or approve by referendum any act passed by the State legislature. California constitution article IV, section 1. The same section reserved to the electors of counties and cities the power of initiative and referendum over acts of local government bodies. In 1950, however, the State supreme court held that local authorities' decisions on seeking Federal aid for public housing projects were "executive" and "administrative," not "legislative," and therefore the State constitution's referendum provisions did not apply to these actions.[1] Within 6 months of that decision the California voters adopted article XXXIV of the State constitution to bring public housing decisions under the State's referendum policy. The article provided that no low-rent housing project should be developed, constructed or acquired in any manner by a State public body until the project was approved by a majority of those voting at a community election.[2]

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[1] *Housing Authority* v. *Superior Court*, 35 Cal. 2d 550, 557–558 (1950).

[2] "Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any geenral or special election.

"For the purpose of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government

The present suits were brought by citizens of San Jose, Calif., and San Mateo County, localities where housing authorities could not apply for Federal funds because low-cost housing proposals had been defeated in referendums. The plaintiffs, who are eligible for low-cost public housing, sought a declaration that article XXXIV was unconstitutional because its referendum requirement violated:

1. The supremacy clause of the U.S. Constitution;
2. The privileges and immunities clause; and
3. The Equal protection clause.

A three-judge court held that article XXXIV denied the plaintiffs equal protection of the laws and it enjoined its enforcement; 313 F. Supp. 1 (ND Cal. 1970). Two appeals were taken from the judgment, one by the San Jose City Council, and the other by a single member of the council. We noted probable jurisdiction of both appeals; 398 U.S. 949 (1970); 399 U.S. 925 (1970). For the reasons that follow, we reverse.

The three-judge court found the supremacy clause argument unpersuasive, and we agree. By the Housing Act of 1937 the Federal Government has offered aid to States and local governments for the creation of low-rent public housing. However, the Federal legislation does not purport to require that local governments accept this or to outlaw local referendums on whether the aid should be accepted. We also find the privileges and immunities argument without merit.

While the district court cited several cases of this court, its chief reliance plainly rested on *Hunter* v. *Erickson*, 393 U.S. 385 (1969). The first paragraph in the district court's decision stated simply: "We hold article XXXIV to be unconstitutional. *Hunter* v. *Erickson* . . . ." The court below erred in relying on *Hunter* to invalidate article XXXIV. Unlike the case before us, *Hunter* rested on the conclusion that Akron's referendum law denied equal protection by placing "special burdens on racial minorities within the governmental process." Id., at 391. In *Hunter* the citizens of Akron had amended the city charter to require that any ordinance regulating real estate on the basis of race, color, religion, or national origin could not take effect without approval by a majority of those voting in a city election. The court held that the amendment created a classification based upon race because it required that laws dealing with racial housing matters could take effect only if they survived a mandatory referendum while other housing ordinances took effect without any such special election. The opinion noted:

> Because the core of the 14th amendment is the prevention of meaningful and unjustifiable official distinctions based on race, [citing a group of racial discrimination cases] racial classifications are "constitutionally suspect" . . . and subject to the "most rigid scrutiny. . . ." They "bear a far heavier burden of justification than other classifications. . . ." Id., at 391–392.

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or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. . . .

"For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding. . . ."

The court concluded that Akron had advanced no sufficient reasons to justify this racial classification and hence that it was unconstitutional under the 14th amendment.

Unlike the Akron referendum provision, it cannot be said that California's article XXXIV rests on "distinctions based on race." Id., at 391. The article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). The present case could be affirmed only by extending *Hunter*, and this we decline to do.

California's entire history demonstrates the repeated use of referendums to give citizens a voice on questions of public policy. A referendum provision was included in the first State constitution, California constitution of 1849, article VIII, and referendums have been a commonplace occurence in the State's active political life.[3] Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice. Nonetheless, appellees contend that article XXXIV denies them equal protection because it demands a mandatory referendum while many other referendums only take place upon citizen initiative. They suggest that the mandatory nature of the article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But of course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.

Furthermore, an examination of California law reveals that persons advocating low-income housing have not been singled out for mandatory referendums while no other group must face that obstacle. Mandatory referendums are required for approval of State constitutional amendments, for the issuance of general obligation long-term bonds by local governments, and for certain municipal territorial annexations. See California constitution article XVIII, article XIII, section 40; article XI, section 2 (b). California statute books contain much legislation first enacted by voter initiative, and no such law can be repealed or amended except by referendum. California constitution article IV, section 24(c). Some California cities have wisely provided that their public parks may not be alienated without mandatory referendums, see, for example, San Jose Charter, section 1700.

The peopleof California have also decided by their own vote to require referendum approval of low-rent public housing projects. This procedure insures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues.[4] It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decisionmaking does not violate the constitutional command that no State shall deny to any person "the equal protection of the laws."

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[3] See, *e.g.*, Crouch, Winston W. "The Initiative and Referendum in California," The Haynes Foundation, Los Angeles, 1950.

The judgment of the three-judge court is reversed and the case is remanded for dismissal of the complaint.

Reversed.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

Mr. Justice MARSHALL, whom Mr. Justice BRENNAN and Mr. Justice BLACKMUN join, dissenting.

By its very terms, the mandatory prior referendum provision of Article 34 applies solely to:

> . . . any development composed of urban or rural dwellings. apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends asistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise.

Persons of low income are defined as:

> . . . persons or families who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

The article explicitly singles out low-income persons to bear its burden. Publicly assisted housing developments designed to accommodate the aged, veterans, State employees, persons of moderate income, or any class of citizens other than the poor, need not be approved by prior referenda.[5]

In my view, article 34 on its face constitutes invidious discrimination which the equal protection clause of the 14 amendment plainly prohibits. "The States, of course, are prohibited by the equal protection clause from discriminating between 'rich' and 'poor' as such in the formulation and application of their laws." *Douglas* v. *California*, 372 U.S. 353, 361 (1963) (Mr. Justice Harlan, dissenting). Article 34 is neither "a law of general applicability that may affect the poor more harshly than it does the rich," ibid, nor an "effort to redress economic imbalances," ibid. It is rather an explicit classification on the basis of poverty—a suspect classification which demands exacting judicial scrutiny, see *McDonald* v. *Board of Education*, 394 U.S. 802, 807 (1969); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); *Douglass* v. *California*, 372 U.S. 353 (1963).

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[4] Public low-rent housing projects are financed through bonds issued by the local housing authority. To be sure, the Federal Government contracts to make contributions sufficient to cover interest and principal, but the local government body must agree to provide all municipal services for the units and to waive all taxes on the property. The local services to be provided include school, police, and fire protection, sewers, streets, drains, and lighting. Some of the cost is defrayed by the local governing body's receipt of 10% of the housing project rentals, but of course the rentals are set artificially low. Both appellants and appellees agree that the building of federally-financed low-cost housing entails costs to the local community. Appellant Shaffer's Brief, at 34–35, Appellee's Brief, at 47. See also 42 U.S. § § 1401–1430.

[5] California la authorizes the formation of Renewal Area Agencies whose purposes include the construction of "low income, middle income and normal market housing," California Health and Safety Code § § 33701 *et seq.* Only low income housing programs are subject to the mandatory referendum provision of Article 34 even though all of the agencies' programs may receive substantial governmental assistance.

The Court, however, chooses to subject the article to no scrutiny whatsoever and treats the provision as if it contained a totally benign, technical economic classification. Both the appellees and the Solicitor General of the United States as amicus curiae have strenuously argued, and the court below found, that article 34, by imposing a substantial burden solely on the poor, violates the 14th amendment. Yet after observing that the article does not discriminate on the basis of race, the Court's only response to the real question in this case is the unresponsive assertion that "referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." It is far too late in the day to control that the 14th amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the 14th amendment was designed to protect.

I respectfully dissent.

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